Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

STEPHEN JOHNSON,

Petitioner,

v.

MARYLOU ZSCHACH,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Ohio

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.

Is the right to due process of law of an unmarried father, who has established a substantial relationship with the child, violated in an adoption proceeding by (1) the failure of the probate court to obtain his consent prior to entering a final decree of adoption, (2) by the probate court's erroneous holding that he was required to file an objection to the adoption, and (3) by the probate court's failure to accept either the conditions incorporated into the consent to adoption or a motion to vacate an interlocutory adoption decree as a written objection?

II.

Is an unmarried father's right to due process of law in an adoption proceeding violated by the probate court's entering a final adoption decree that differs materially from the interlocutory decree, without providing him with notice and an opportunity to be heard?

III.

Is the right to equal protection under the law of an unmarried father who has established a substantial relationship with his child violated by the application to that father of a statute that requires unwed fathers, but not unwed mothers, to file a written objection with the court or another government body in order to preserve their right to written consent to the adoption of their children by others?

PARTIES TO THE PROCEEDING IN THE COURT BELOW

The parties to the proceeding in the court below were: Stephen Johnson (an appellee below), Marylou Zschach (the appellant below), and Nan Barnebey (an appellee below).

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Stephen Johnson, respectfully prays that a writ of certiorari be issued to review the judgment of the Supreme Court of Ohio entered in the above-entitled proceeding on June 6 and July 3, 1996.

OPINIONS BELOW

The June 6, 1996 opinion of the Ohio Supreme Court in the present case is reported at 75 Ohio St. 3d 648, 665 N.E.2d 1070 (1996), and is reproduced in the appendix to this petition at App. 2-33. The July 3, 1996 order of the Ohio Supreme Court denying reconsideration is reported at 76 Ohio St. 3d 1410 (1996) and is reproduced at App. 1.

The opinion of the Court of Appeals of Fairfield County, Ohio in *In the Matter of the Adoption of Glennnoel Gretchen Reah Zschach*, Nos. 1994-CA-14 & 1994-CA-19, Court of Appeals for Fairfield County, Ohio, November 14, 1994, is unreported, but is reproduced at App. 37-42. Its December 20, 1994 Per Curiam opinion upon reconsideration is also unreported and is reproduced at App. 34-37.

JURISDICTION

The decision of the Ohio Supreme Court in *In the Matter of the Adoption of Glennnoel Gretchen Reah Zschach*, 75 Ohio St. 3d 648, 665 N.E.2d 1070 (1996), was entered on June 6, 1996. App. 2-33. The entry of the Ohio Supreme Court denying reconsideration was entered on July 3,

1996. 76 Ohio St. 3d 1410 (1996), App. 1. This petition is timely filed within ninety days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a) (1996).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth Amendment to the Constitution of the United States, which provides:

AMENDMENT V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

This case also involves the Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part:

AMENDMENT XIV

> SECTION I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall

> make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case involves the following Sections of the Ohio Revised Code:

OHIO REV. CODE § 3107.06: Consents Required

Unless consent is not required under section 3107.07 of the Revised Code, a petition to adopt a minor may be granted only if written consent to the adoption has been executed by all of the following:

(A) The mother of the minor;

(B) The father of the minor, if the minor was conceived or born while the father was married to the mother, if the minor is his child by adoption, or if the minor has been established to be his by a court proceeding;

(C) Any person or agency having permanent custody of the minor or authorized by court order to consent;

(D) The juvenile court that has jurisdiction to determine custody of the minor, if the legal guardian or custodian of the minor is not authorized by law or court order to consent to the adoption;

(E) The minor, if more than twelve years of age unless the court, finding that it is in the best interest of

the minor, determines that the minor's consent is not required.

(F) Subject to division (B) of section 3107.07 of the Revised Code, the putative father, if he:

(1) Is alleged to be the father of the minor in proceedings brought under sections 3111.01 to 3111.19 of the Revised Code at any time before the placement of the minor in the home of the petitioner;

(2) Has acknowledged the child in a writing sworn before a notary public at any time before the placement of the minor in the home of the petitioner;

(3) Has signed the birth certificate of the child as an informant as provided in section 3705.09 of the Revised Code;

(4) Has filed an objection to the adoption with the agency having custody of the minor or the department of human services at any time before the placement of the minor in the home of the petitioner, or with the probate court or the department of human services within thirty days of the filing of a petition to adopt the minor or its placement in the home of the petitioner, whichever occurs first.

OHIO REV. CODE § 3107.07: Consents not required

Consent to adoption is not required of any of the following:

(A) A parent of a minor, when it is alleged in the adoption petition and the court finds after proper service of notice and hearing, that the parent has failed without

justifiable cause to communicate with the minor or to provide for the maintenance and support of the minor as required by law or judicial decree for a period of at least one year immediately preceding either the filing of the adoption petition or the placement of the minor in the home of the petitioner.

(B) The putative father of a minor if the putative father fails to file an objection with the court, the department of human services or the agency having custody of the minor as provided in division (F)(4) of section 3107.06 of the Revised Code, or files an objection with the court, department, or agency and the court finds, after proper service of notice and hearing, that he is not the father of the minor, or that he has willfully abandoned or failed to care for and support the minor, or abandoned the mother of the minor during her pregnancy and up to the time of her surrender of the minor, or its placement in the home of the petitioner, whichever occurs first;

(C) A parent who has relinquished his right to consent under section 5103.15 of the Revised Code;

(D) A parent whose parental rights have been terminated by order of a juvenile court under Chapter 2151. of the Revised Code;

(E) A legal guardian or guardian ad litem of a parent judicially declared incompetent in a separate court proceeding who has failed to respond in writing to a request for consent, for a period of thirty days, or who, after examination of his written reasons for withholding consent, is found by the court to be withholding his consent unreasonably;

(F) Any legal guardian or lawful custodian of the person to be adopted, other than a parent, who has failed to respond in writing to a request for consent, for a period of thirty days, or who, after examination of his written reasons for withholding consent, is found by the court to be withholding his consent unreasonably;

(G) The spouse of the person to be adopted, if the failure of the spouse to consent to the adoption is found by the court to be by reason of prolonged unexplained absence, unavailability, incapacity, or circumstances that make it impossible or unreasonably difficult to obtain the consent or refusal of the spouse;

(H) Any parent, legal guardian, or other lawful custodian in a foreign country, if the person to be adopted has been released for adoption pursuant to the laws of the country in which the person resides and the release of such person is in a form that satisfies the requirements of the immigration and naturalization service of the United States department of justice for purposes of immigration to the United States pursuant to section 101(b)(1)(F) of the "Immigration and Nationality Act," 75 Stat. 650 (1961), 8 U.S.C. 1101(b)(1)(F), as amended or reenacted.

STATEMENT OF THE CASE

Cybele Reah Johnson, also known as Glennoel Gretchen Reah Zschach, born July 24, 1992, is the biological daughter of Stephen Johnson (the petitioner) and Nan Barnebey. App. 52. Shortly after Cybele was born, Ms. Barnebey began to search for an adoptive home for the child. She placed the baby with a friend, Marylou

Zschach, in October 1992, without the consent of Mr. Johnson,[1] from whom she concealed Cybele's whereabouts. The next month, Ms. Zschach filed a petition for adoption with the Probate Court of Fairfield County, Ohio.

Mr. Johnson was asked for his consent to Cybele's adoption by Ms. Zschach. He did not wish to consent to the adoption, but Ms. Barnebey would not tell him where his daughter was until he agreed to do so. Mr. Johnson ultimately agreed to sign a conditional consent that guaranteed a reservation of rights to visitation. App. 50-51. It reads in full:

> CONSENT TO ADOPTION
>
> The undersigned Stephen Reah Johnson represents that he is qualified to consent to the adoption of Cybele Reah Johnson, and the undersigned hereby consents to the adoption of the child as proposed in the petition.
>
> This consent is conditioned upon the undersigned father of the minor child being granted visitation rights with the minor child to include at least twenty hours (20) per month in the Final Decree of Adoption. In the event that said Decree of Adoption does not award said visitation rights, this consent shall be null and void.

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[1] The Ohio Supreme Court's opinion erroneously stated that Mr. Johnson participated in the placement of his daughter. 75 Ohio St. 3d at 655, 665 N.E.2d at 1076, App. 14.

> The undersigned further states that this consent is voluntarily executed.
>
> /s/ Stephen Reah Johnson

The probate court set a hearing on the petition and thereafter entered an interlocutory order of adoption with visitation rights for Mr. Johnson. App. 48-49. The order did not include a date upon which it would be final. The court continued the case until the child had lived with Ms. Zschach for at least six months, the statutory minimum. The interlocutory order included a grant to Mr. Johnson of visitation rights of at least twenty hours per month, App. 49, which he regularly exercised throughout the subsequent adoption proceedings.

Soon after the interlocutory order was filed, Ms. Zschach refused to let Ms. Barnebey see her daughter. Ms. Barnebey then moved to vacate the order on the grounds of fraud, misrepresentation, and undue influence. The probate court set a hearing on that motion for March 30, 1993. Ms. Zschach obtained a stay of that hearing and filed motions for attorney's fees and for an order of contempt against Ms. Barnebey for an alleged violation of a restraining order issued by the court. Ms. Barnebey obtained a stay of any final order of adoption until all other motions before the court had been decided. The court granted Ms. Zschach's requested order of summary judgment on the issue of Ms. Barnebey's consent, but found no violation of the restraining order.

Next, the court set a final hearing for October 4, 1993. Just before that date, Ms. Barnebey appealed the probate court's order of summary judgment and moved to stay

the adoption proceedings pending the appeal. The probate court granted this stay as well.

Shortly thereafter, Mr. Johnson became concerned that Ms. Zschach intended to engineer the removal of the visitation provision from the adoption order. He therefore filed, on December 28, 1993, a Motion for Relief from Judgment, App. 44-47, asking the court to suspend the interlocutory order "pending resolution of the question of visitation," and reiterating that his consent "was clearly conditioned on his being allowed visitation." App. 46.

On March 2, 1994, the probate court dismissed that motion as premature, holding that the interlocutory order was not a final, appealable order. On March 24, 1994, without any notice that the stayed hearing would not be held at all, the court journalized its entry finalizing the radically changed adoption decree. App. 43.

Mr. Johnson filed a timely appeal.[2] The appellate court ruled in Mr. Johnson's favor. *In re Adoption of Zschach*, Nos. 1994-CA-14 & 1994-CA-19, Court of Appeals for Fairfield County, Nov. 14, 1994, App. 37-42. Mr. Johnson's conditional consent, held that court, constituted an objection to the adoption, which, pursuant to Ohio statutory law, precluded the entry of a final order of adoption without a hearing. App. 42.

Ms. Zschach appealed to the Ohio Supreme Court, which agreed to hear the case. That court reversed on

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[2] Ms. Barnebey also filed appeals at both the intermediate and state supreme court levels, on different grounds from Mr. Johnson's. Those appeals are irrelevant to the issues in Mr. Johnson's appeal and therefore are not discussed herein.

June 6, 1996. *In the Matter of the Adoption of Glennnoel Gretchen Reah Zschach*, 75 Ohio St. 3d 648, 665 N.E.2d 1070 (1996), App. 2-33. Mr. Johnson filed a timely motion for reconsideration. The court denied that motion on July 3, 1996. App. 1. This Petition follows.

HOW THE FEDERAL ISSUES WERE RAISED AND DECIDED BELOW

The due process claims set forth in this Petition were raised in Mr. Johnson's merit brief in the Fairfield County Court of Appeals. That court held in Mr. Johnson's favor. *In re Adoption of Zschach*, Nos. 1994-CA-14 & 1994-CA-19, Court of Appeals for Fairfield County, Nov. 14, 1994, App. 37-42.

The due process claims were again raised by Mr. Johnson in his merit brief in the Ohio Supreme Court. The Ohio Supreme Court rejected Mr. Johnson's due process claims, although it discussed only the claim that Mr. Johnson's conditional consent constituted an objection. 75 Ohio St. 3d 648, 652-54, 665 N.E.2d 1070, 1074-75, App. 9-13. The equal protection claim was raised, along with renewed due process claims, in Mr. Johnson's motion for reconsideration:

> [T]here is no doubt that the Court has applied separate standards of due process. There is one standard for the mother and another standard for the father. If due process is meant to be for all, then here due process has been denied the father.
>
> * * *

> There is a striking contrast in the due process protections that the Decision affords the mother from those afforded to the father. The Court holds that "a father[ ] . . . may file an objection to the adoption, thereby making his consent necessary." On the other hand, the Decision holds that the Court lacks jurisdiction even to consider a Petition for Adoption unless the mother gives a "valid consent." A "valid consent" is defined as one which has been freely, knowingly and voluntarily given with a full understanding of the adoption process and the consequences of ones [*sic*] actions. There is no way that anyone could argue that Johnson gave a valid consent, given the circumstances of this case.
>
> * * *
>
> It is respectfully submitted that a greater injustice results from the majority opinion in the within cause than a denial of due process and equal protection.

Motion for Reconsideration of Appellee, Stephen Johnson, Ohio Supreme Court Case Nos. 95-170 & 94-2752, June 17, 1996, at 5, 11-12. The due process and equal protection claims were denied without comment by the Ohio Supreme Court. App. 1.

REASONS FOR GRANTING THE WRIT

I.

Mr. Johnson's right to due process of law was violated by the failure of the probate court to obtain his consent prior to entering a final decree of the adoption of his daughter by another, by its erroneous holding that he was required to file an additional objection to the adoption, and by its failure to accept either a conditional consent to adoption or a motion to vacate the interlocutory decree of adoption as the written objection required by state law.

Stephen Johnson had a liberty interest, protected by the Due Process Clause of the United States Constitution, in the custody of his daughter, Cybele. Ohio abridged that liberty interest when it granted custody of Cybele to a non-relative without her father's consent and without providing him with notice or a meaningful opportunity to object. The Ohio Court of Appeals so held, and granted Mr. Johnson relief.

The Ohio Supreme Court recognized Mr. Johnson's due process interest, but held (1) that it was adequately protected by Ohio's statutory scheme, (2) that neither his conditional consent nor his motion for relief satisfied his obligations under that scheme, and (3) that he received adequate notice and hearing to preserve his rights. All of these holdings are incorrect.

A. Consent

1. Mr. Johnson did not consent to the adoption

Mr. Johnson's consent was a necessary precondition to Cybele's adoption by Ms. Zschach. Under Ohio law, an

adoption may not be finalized without the father's consent, subject to certain statutory exceptions discussed below. Mr. Johnson did not consent to the adoption that occurred (a point acknowledged by the Ohio Supreme Court, 75 Ohio St. 3d at 653-54, 665 N.E.2d at 1075, App. 11-12), nor do any of the statutory exceptions apply to excuse that consent requirement.

When Marylou Zschach filed her adoption petition, Nan Barnebey filed an unconditional consent to the adoption. Stephen Johnson did not. Instead, he filed a consent conditioned upon his being granted at least twenty hours per month of visitation with his daughter. The consent form further specified (1) that the visitation rights were to be set forth in the final decree of adoption, and (2) that if the final decree did not include such a provision, then "the consent shall be null and void." App. 50.

In effect, Mr. Johnson was seeking an "open" adoption, in which visitation rights of a biological relative survive a final decree of adoption. However, Ohio does not permit open adoption; when a child is adopted, biological parents lose all their parental rights. Ohio Rev. Code § 3107.15(A)(1). Mr. Johnson, Ms. Barnebey, Ms. Zschach, and even the probate court and counsel, were unaware of this prohibition. The probate court incorporated the visitation provision into the interlocutory decree. App. 49. Mr. Johnson, like the other parties, reasonably relied upon the representations of both the court and counsel that he was consenting to an open adoption, the only arrangement acceptable to him. Furthermore, the wording of Mr. Johnson's conditional consent must be read as rendering the consent void *ab initio* without the visitation provision:

> This consent is conditioned upon the undersigned father of the minor child being granted visitation rights with the minor child to include at least twenty hours (20) per month in the Final Decree of Adoption. **In the event that said Decree of Adoption does not award said visitation rights, this consent shall be null and void.**

App. 50 (emphasis added). As the final decree did not include the visitation provision, it was entered without Mr. Johnson's consent. Thus, the next question is whether his consent was excused.

2. The consent requirement was not excused, as Mr. Johnson was not required to file an objection

Mr. Johnson signed Cybele's birth certificate as her father, and therefore was entitled to withhold consent under division (F)(3) of R.C. 3107.06, unless something in R.C. 3107.07 excused the consent requirement. Those statutes read, in pertinent part:

> **R.C. 3107.06 Consents Required**
>
> Unless consent is not required under section 3107.07 of the Revised Code, a petition to adopt a minor may be granted only if written consent to the adoption has been executed by all of the following:
>
> * * *
>
> (F) Subject to division (B) of section 3107.07 of the Revised Code, the putative father, if he:

(1) Is alleged to be the father of the minor in proceedings brought under sections 3111.01 to 3111.19 of the Revised Code at any time before the placement of the minor in the home of the petitioner;

(2) Has acknowledged the child in a writing sworn before a notary public at any time before the placement of the minor in the home of the petitioner;

(3) Has signed the birth certificate of the child as an informant as provided in section 3705.09 of the Revised Code;

(4) Has filed an objection to the adoption with the agency having custody of the minor or the department of human services at any time before the placement of the minor in the home of the petitioner, or with the probate court or the department of human services within thirty days of the filing of a petition to adopt the minor or its placement in the home of the petitioner, whichever occurs first.

R.C. 3107.07 Consents Required

Consent to adoption is not required of any of the following:

* * *

(B) The putative father of a minor if the putative father fails to file an objection with the court, the department of human services or the agency having custody of the minor as provided in division (F)(4) of section 3107.06 of the Revised Code, or files an objection with the court, department, or agency and the court finds, after proper service of notice and hearing,

> that he is not the father of the minor, or that he has willfully abandoned or failed to care for and support the minor, or abandoned the mother of the minor during her pregnancy and up to the time of her surrender of the minor, or its placement in the home of the petitioner, whichever occurs first.

Mr. Johnson did not fall within the provisions of R.C. 3107.07(B) at all. The second part of subsection (B) deals only with cases in which there is an allegation of abandonment or nonsupport. There was no such allegation in this case. An objection is required under the first part of subsection (B) **only** "as provided **in division (F)(4)** of section 3107.06." Ohio Rev. Code § 3107.07(B) (emphasis added). Division (F)(4), the only division dealing with filing an objection, applies only to putative fathers who have not either (a) been alleged to be the father in a court proceeding (per division (F)(1)), (b) acknowledged the child in a sworn and notarized writing (per division (F)(2)), or (c) signed the child's birth certificate as an informant (per division (F)(3)). The only logical reading of the statute is that R.C. 3107.07(B) applies **only** to fathers who do **not** fall within R.C. 3107.06(F)(1), (F)(2), or (F)(3). Any other reading would render divisions (F)(1), (F)(2), and (F)(3), as well as the reference in section 3107.07(B) to division (F)(4), superfluous.

In *In re Adoption of Greer*, 70 Ohio St. 3d 293, 638 N.E.2d 999 (1994), the Ohio Supreme Court explained at length its conclusion that fathers falling within divisions (F)(1), (F)(2), and (F)(3) are **not** also subject to the requirements of division (F)(4):

> R.C. 3107.06(F) does not specifically designate whether the divisions of subsection (F) are to be read in the conjunctive or the disjunctive, as neither the word "or" or "and" is used at the conclusion of R.C. 3107.06(F)(1), (2), and (3). The statute cannot, however, be logically read to require a putative father to comply with each and every subsection of division (F), *i.e.*, a putative father need not sign a birth certificate *and* initiate a paternity action, *and* acknowledge his child before a notary public to procure a right to withhold consent. **That being the case, it is unlikely that the legislature intended that putative fathers falling within the scope of R.C. 3107.06(F)(1), (2), or (3) should also be required to comply with R.C. 3107.06(F)(4).** . . .
>
> . . . Upon taking the actions described in R.C. 3107.06(F)(1), (2), and (3), putative fathers are vested with a significant right, *i.e.*, the right to withhold consent to the adoption of children they claim to be their natural offspring, thereby precluding their adoption by another. Once vested with that property [*sic*] interest, such fathers may not be deprived of that interest in the absence of procedural due process requirements of adequate notice and an opportunity to be heard.

Id. at 300-01, 638 N.E.2d at 1005 (last emphasis added).[3]

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[3] Although one portion of the *Greer* opinion suggests that fathers falling within division (F)(3) are nevertheless required to file a written objection under subsection (B), *id.* at paragraph 3 of the syllabus & 301, 638 N.E.2d at 1006, the portion of subsection (B) at issue in *Greer* is not the same portion at issue in the present case. In *Greer*, the father was alleged not to have communicated with or supported the child. Unmarried fathers

Mr. Johnson, having signed Cybele's birth certificate (*compare Lehr v. Robertson*, 463 U.S. 254 (1983)), falls under division (F)(3), and therefore was not subject to R.C. 3107.07(B). In sum, Mr. Johnson was not even required to file an objection in order to preserve his right to withhold consent to Cybele's adoption under R.C. 3107.06.

B. Mr. Johnson did object to Cybele's adoption by Ms. Zschach: both the conditional consent and the motion for relief were written objections under R.C. 3107.07

The Ohio Court of Appeals correctly held that even if Mr. Johnson were required to file an objection, his conditional consent – explicitly granted **only** if the visitation provision were included in the final decree – functioned as that objection and satisfied the statutory requirement. App. 42. In addition, Mr. Johnson filed a motion for relief prior to the entry of the final order, in which he specifically stated his objection to any adoption that would not include the visitation provision set forth in the interlocutory decree. App. 45-46.

The Ohio Supreme Court's disagreement on this point is difficult to understand. That court acknowledged

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falling under divisions (F)(1), (2), and (3) – indeed, like **any** parent, pursuant to R.C. 3107.07(A) – are subject, under the **second** portion of subsection (B), to loss of the right to withhold consent if they are found, after proper notice and hearing, to have failed in these duties. In the present case, there was no allegation of failure to perform parental duties, so the second part of R.C. 3107.07(B), at issue in *Greer*, is irrelevant.

that the purpose of the objection requirement is to demonstrate the continuing interest and involvement of a putative father: "In the absence of the objection required under R.C. 3107.07(B), a court lacks any indication of the putative father's full commitment to the responsibilities of parenthood." 75 Ohio St. 3d at 651, 665 N.E.2d at 1073, App. 7. The Ohio Supreme Court failed to explain why Mr. Johnson's conditional consent and his motion for relief from the interlocutory decree – both of which were in writing and both of which were before the probate court – did not satisfy the statute and serve to give the probate court notice of exactly that interest. Both documents stated Mr. Johnson's objection and refusal to consent to the "closed" adoption at issue. The motion for relief stated explicitly both Mr. Johnson's objection to the adoption and his "full commitment to the responsibilities of parenthood," past, present, and future:

> It is with much hesitation that Stephen Johnson becomes involved in this action, and he does so at this point in time . . . **to protect his rights to continue his relationship with his daughter.**
>
> * * *
>
> Movant was present at the birth of his child. He has always desired to maintain a continuing relationship with the child and did so prior to the concealment of the child with the petitioner herein. In fact, on two occasions he had sole possession of the child for several days, one being approximately for ten days. . . .
>
> Movant finally conditionally consented to the adoption, only under extreme pressure. He

> was assured by Nan Barnebey that the petitioner wanted the baby to know him as her father. . . .
>
> . . . Movant has continued to exercise his visitation during the period of time this litigation has been going on.
>
> * * *
>
> The consent of the movant was clearly conditioned on his being allowed visitation. If, in fact, he cannot be legally allowed visitation, there was clearly a mistake[,] inadvertence, surprise or excusable neglect and misrepresentation and other reasons justifying relief from judgment.

Motion for Relief from Judgment, *In the Matter of the Adoption of Glennoel Gretchen Reah Zschach*, No. 53261, Probate Court of Fairfield County, Ohio, Dec. 28, 1993, App. 45-46.

The statute does not specify any particular form for the objection; it refers merely to "an objection." Ohio Rev. Code § 3107.07(B). Thus, the State cannot even make the "form over substance" bright-line argument that Mr. Johnson's due process rights were adequately protected by the probate court's having only "strictly complied with the . . . provisions of the statute," *Lehr*, 463 U.S. at 265, because that statute requires no more than what Mr. Johnson did – twice.

Moreover, even if only a specific document or form were acceptable for an objection, then the State would have had a duty to Mr. Johnson under the Due Process Clause to give him adequate notice of that fact. Of course, it did not do so.

II.

Mr. Johnson's right to due process of law was violated by the failure of the probate court to provide him with notice and an opportunity to be heard after it had materially changed the terms of the order to be issued.

In *Lehr*, this Court held that "[w]hen an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child' his interest in personal contact with his child acquires substantial protection under the Due Process Clause." 463 U.S. at 261 (quoting *Caban v. Mohammed*, 441 U.S. 380, 392 (1979)). Thus, "state intervention to terminate [such a] relationship . . . must be accomplished by procedures meeting the requisites of the Due Process Clause." *Id.* at 258 (quoting *Santosky v. Kramer*, 455 U.S. 745, 753 (1982)).

The Ohio Supreme Court acknowledged that Mr. Johnson had this due process interest in the custody of his daughter, entitling him to adequate notice and an opportunity to be heard. 75 Ohio St. 3d at 652-53, 665 N.E.2d at 1074-75, App. 9-11. However, that court incorrectly concluded that the State had properly afforded him that notice and opportunity to be heard. *Id.* at 653-54, 665 N.E.2d at 1075, App. 11-13.

Although the probate court originally set a hearing on the final order of adoption, it never held that hearing: the court first stayed the hearing and finally dispensed with it altogether, entering the final decree of adoption on March 24, 1994 without a hearing or any notice to the parties that there would be none. The Ohio Supreme Court held that Mr. Johnson's having received notice of

the December 24, 1992 hearing on the **interlocutory** order sufficed to protect his due process rights, noting that Mr. Johnson did not file any objection prior to that hearing. *Id.*

But why would he have done so? The interlocutory order contained the visitation provision, the *sine qua non* of his consent. It was only **after** the interlocutory order was entered that Mr. Johnson learned that Ms. Zschach's counsel intended to dispute the visitation provision, and upon so learning, he filed his motion for relief from judgment. Mr. Johnson was entitled to a hearing on the adoption order that actually went into effect, to which he did **not** consent, but he never got that hearing. He was stuck with the very major – for him, the decisive – change in the terms of the decree.

This sort of "bait and switch" notice is no notice at all, and it certainly violates the Due Process Clause. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' " *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). If courts are allowed to make material changes in orders **after** the only notice and hearing have already passed, then the notice and hearing are meaningless altogether. Indeed, counsel will have the duty to advise **all** clients **never** to consent to anything, lest the court later change the provisions of the agreement consented to with no further opportunity for the affected party to be heard. The waste and burden on the courts' dockets would be staggering, but there would be no other way to protect parties against having to live with terms to which they never agreed.

III.

Mr. Johnson's right to equal protection of the laws was violated by application to him of the State's requirement that an unmarried father, but not a similarly situated unmarried mother, must file an objection to the adoption of his child.

Under the Equal Protection Clause of the Fourteenth Amendment, the State may not subject similarly situated men and women to different treatment when there is no substantial relation between the disparity and an important state purpose. *Lehr*, 463 U.S. at 266 (citing *Reed v. Reed*, 404 U.S. 71 (1971); *Craig v. Boren*, 429 U.S. 190 (1976)). Where unmarried parents are similarly situated with regard to their relationships to the child, then the State may not treat fathers and mothers differently with regard to the veto process over the adoption of their child.

In *Lehr*, this Court reviewed its prior decisions regarding disparate treatment of unmarried mothers and unmarried fathers. Although under some circumstances fathers may be subject to more stringent rules for vetoing an adoption than mothers, the deciding factor is not the sex of the father, but the relationship he has established and maintained with the child. Thus, in *Quilloin v. Walcott*, 434 U.S. 246 (1978), this Court upheld, against an equal protection challenge, a Georgia statute that always required an unmarried mother's consent to the adoption of her child, but required the father's consent only if he had legitimated the child. Likewise, in *Lehr*, this Court found that the New York statute that similarly granted veto power to all unmarried mothers but only to certain putative fathers did not violate the Equal Protection

Clause as applied to the father in *Lehr*, because he had "never established any custodial, personal, or financial relationship" with his daughter. 463 U.S. at 267.

By contrast, in *Caban v. Mohammed*, 441 U.S. 380 (1979), this Court held that the Equal Protection Clause prohibited the granting of a veto over adoption to an unwed mother while denying it to the father, who had admitted paternity and had participated in rearing the children. This Court stressed that its decision rested on the father's having come forward to participate in the children's upbringing, and repeated that standard in *Lehr*. 463 U.S. at 267-68.

Mr. Johnson's position is like that of the father in *Caban*, not that of the fathers in *Quilloin* or *Lehr*. He was present at his daughter's birth, signed her birth certificate as her father, and participated in her upbringing as much as he was permitted to by Ms. Barnebey and Ms. Zschach. Despite their interference, his position was not like that of the father in *Lehr*, who, as the dissent in that case noted, had been prevented by the mother from developing a significant relationship with his daughter. 463 U.S. at 268-69 (White, J., dissenting). Rather, during the few weeks between her birth and her placement with Ms. Zschach, not only did Mr. Johnson frequently visit his daughter, she stayed with him twice, once for ten days, until Ms. Barnebey took her away. After Cybele's placement with Ms. Zschach, he continued his regular visits with her. He set up a trust for his daughter and even purchased a home near her in Fairfield County to facilitate his visits with her. Moreover, he insisted upon retaining substantial visitation rights in the future. Indeed, Mr. Johnson has done more with and for Cybele than do

many married fathers, who by virtue of nothing more than their marital status would not be subject to the obstacles imposed upon Mr. Johnson.

Under this Court's decisions in *Lehr, Quilloin,* and *Caban,* Mr. Johnson as an unwed father had the right under the Equal Protection Clause not to be treated differently from an unwed mother with regard to the power to veto the adoption of his daughter. The State of Ohio did not afford him this equal treatment.

CONCLUSION

The "bait and switch" due process issue in this case is applicable not only to all future adoption proceedings, but to any proceeding involving consent, notice, hearing, and opportunity to object. If the decision of the Ohio Supreme Court in this case is allowed to stand, courts will be able to change central provisions of decrees **after** the last opportunity for parties to receive notice and an opportunity to be heard has passed. If courts can do that, as the probate court did in the present case, then attorneys will be forced to advise their clients **always** to object to and demand a hearing on **everything**, or risk being bound by anything and everything the court might decide to insert, delete, or change later. This Court should take this opportunity to correct this unacceptable precedent along with the other violations of the Due Process Clause in this case.

Mr. Johnson was also entitled to equal treatment under the law. The State violated Mr. Johnson's rights

under the Equal Protection Clause by requiring Mr. Johnson, who has always been significantly involved in his daughter's upbringing, to overcome legal hurdles not required of similarly situated mothers. Unfortunately, the consequence of the Ohio courts' unfairness must be borne by the family at the center of this case.

In his dissent to the Ohio Supreme Court's opinion in this case, Justice Pfeifer wrote:

> By conditioning his consent on visitation rights, Johnson, in writing, indicated that he did not consent to a legal adoption. Johnson's qualified consent was apparently accepted by the probate court, which then later told Johnson, in effect, that his qualified consent was meaningless. The whole adoption took place because of everyone's mistaken belief of what the law allows. Johnson should not be the party who pays for that misunderstanding.
>
> This case belongs back where it started, in the probate court. This time, the natural parents' decision whether to consent to the adoption should be made with a full understanding of what their consent means.

75 Ohio St. 3d at 665, 665 N.E.2d at 1083, App. 32-33 (Pfeifer, J., dissenting). Resolution of this case in Mr. Johnson's favor will not automatically result in his regaining exclusive custody of his daughter. Rather, the case will return to the probate court to determine Cybele's custody in the manner prescribed by law. Mr. Johnson will receive the due process of law to which he is entitled by the Constitution and the fairness to which he is entitled by virtue of his status as Cybele's father.

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Ohio Supreme Court.

Respectfully submitted,

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October 1, 1996

THE SUPREME COURT OF OHIO

84-021

In the Matter of the Adoption of Glennoel Gretchen Reah Zschach. [Marylou Zschach, Appellant.]	1996 TERM Case No. 95-170 RECONSIDERATION ENTRY (Fairfield County) (Filed Jul. 3, 1996)

IT IS ORDERED by the Court that the motions for reconsideration in this case be, and hereby are, denied.

(Court of Appeals No. 1994CA14 and 1994CA19)

/s/ Thomas Moyer
THOMAS J. MOYER
Chief Justice

75 Ohio St.3d 648

In re ADOPTION OF ZSCHACH.

Nos. 94-2752, 95-170.

Supreme Court of Ohio.

Submitted Feb. 6, 1996.

Decided June 6, 1996.

The following detailed procedural history permits an understanding of our resolution of several of the issues underlying this case.

In November 1992, appellant, Marylou Zschach ("Zschach"), filed a petition for adoption with the Probate Court of Fairfield County. For approximately one month prior to Zschach's filing of the petition, the child who was the subject of the adoption petition had been living with Zschach with the consent and approval of the child's birth mother, Nan Barnebey ("Barnebey").

On the same day that Zschach filed the adoption petition, Barnebey and Stephen Johnson ("Johnson"), who had signed the child's birth certificate as a father/informant, filed consents to the adoption. While Barnebey's consent was unconditional, Johnson's consent contained the following language:

"This consent is conditioned upon the undersigned father of the minor child being granted visitation rights with the minor child to include at least twenty hours (20) per month in the Final Decree of Adoption. In the event

that said Decree of Adoption does not award said visitation rights, this consent shall be null and void."

The trial court set a hearing on the adoption petition and thereafter entered an interlocutory order of adoption in favor of Zschach. The interlocutory order did not state a date upon which it would become final. Rather, the cause was continued until the child had lived in Zschach's home for at least six months as required by R.C. 3107.13. Also incorporated into the interlocutory order was a grant of visitation rights in favor of Johnson to include at least twenty hours per month.

Within two months of the date of the interlocutory order, Barnebey moved to have it vacated on grounds that her consent to the adoption was induced by fraud, misrepresentation, and undue influence. The court set a hearing on the motion to vacate for March 30, 1993, which was later postponed at Zschach's request. Zschach additionally filed motions with the court for attorney fees in defending against Barnebey's allegations of fraud and for an order of contempt to be issued against Barnebey for an alleged violation of a restraining order issued by the court.

Almost five months after the probate court issued the interlocutory order, Barnebey successfully moved the court to stay any final order of adoption, effective until the other motions before the court had been finally adjudicated.

With leave of the court, Zschach moved for summary judgment regarding the issue of Barnebey's consent and Barnebey filed a cross-motion for summary judgment. The probate court granted Zschach summary judgment,

finding that Barnebey had failed to produce evidence to support her allegations that her consent was the product of fraud, misrepresentation, or undue influence. Additionally, the court found that Barnebey had not violated the restraining order issued against her.

The probate court set the case for an October 4, 1993 final hearing, which was within one year of the interlocutory order's issuance. Just prior to the scheduled final hearing, Barnebey appealed the probate court's order of summary judgment and moved to stay the adoption proceedings pending appeal. The probate court granted Barnebey's motion for a stay.

During the pendency of the appeal, Johnson moved the probate court for relief from judgment regarding the interlocutory order of adoption. In his motion, Johnson cited his concern regarding the preservation of his visitation rights in the final order and moved the court for relief from the interlocutory order "pending resolution of the question of visitation."

The appellate court dismissed Barnebey's appeal for lack of a final appealable order. The probate court dismissed Johnson's motion for relief from judgment as premature.

Barnebey then moved the probate court to dismiss the adoption petition pursuant to R.C. 3107.14(C), alleging that the interlocutory order was not timely finalized. The court denied Barnebey's motion, struck it from the record, and found that filing the motion violated Civ.R. 11. On the next day, March 24, 1994, the court journalized its entry finalizing the adoption. Barnebey and Johnson

filed timely appeals from the probate court's order finalizing adoption.

On review, the appellate court held that Johnson's written consent conditioned on visitation was tantamount to a written objection to the adoption. Accordingly, the court reversed the final decree of adoption and remanded the cause to the probate court to proceed with the adoption anew. Upon consideration of Zschach's application for reconsideration and the responses thereto of Barnebey and Johnson, the appellate court also reversed the trial court's grant of summary judgment regarding the validity of Barnebey's consent.

The cause is now before this court pursuant to the allowance of a discretionary appeal.

Squire, Sanders & Dempsey, David J. Young and Scott L. Marrah, Columbus, Stebelton, Aranda & Snider and James C. Aranda, Lancaster, for appellant Marylou Zschach.

Wristen & Ucker and Ellen L. Wristen, Columbus, for appellee Nan Barnebey.

Arthur H. Thomas, Jr., Worthington, for appellee Stephen Johnson.

James S. Albers, Columbus, urging reversal for amicus curiae, National Council for Adoption.

COOK, Justice.

I

This court has already determined that in order to contest an adoption, "a putative father who has signed

the birth certificate of a child must file a written objection to the adoption with the court, Department of Human Services, or the agency having custody of the child[.]" *In re Adoption of Greer* (1994), 70 Ohio St.3d 293, 638 N.E.2d 999, paragraph three of the syllabus. In this case, we determine that a putative father's attempt to condition his consent to adoption upon his retention of permanent visitation rights is not the equivalent of a written objection as required under R.C. 3107.07(B).

Conjunctively, R.C. 3107.06(F)(3) and 3107.07(B) allow a court to enter a decree of adoption without a putative father's consent if he has failed to file a written objection to the adoption. In holding that Johnson's conditional consent was "tantamount to a written objection to the adoption," the appellate court necessarily determined that what is required to constitute an "objection" under R.C. 3107.07(B) is open to statutory interpretation. Even if we were to agree with the appellate court that such a statutory ambiguity exists, our analysis of the legislative purpose behind enactment of the adoption statutes leads us to conclude that nothing short of a written objection to the adoption proceeding suffices to preserve a putative father's right to contest an adoption.

In deciding the question before us today, it is important to recognize the competing policy considerations that the legislature attempts to balance through its enactment of the adoption statutes related to putative fathers. A putative father's right to a parental relationship with his offspring has been recognized by this court as well as the Supreme Court of the United States. *See Greer*, 70 Ohio St.3d at 298, 638 N.E.2d at 1003; *Lehr v. Robertson* (1983), 463 U.S. 248, 261-265, 103 S.Ct. 2985, 2993-2996, 77

L.Ed.2d 614, 626-629. The rationale for protecting the right of a putative father to have a parental relationship with his offspring is as follows:

"The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development." *Lehr* at 262, 103 S.Ct. at 2993, 77 L.Ed.2d at 627; *Greer* at 298, 638 N.E.2d at 1003-1004, fn. 2.

Ultimately, the goal of adoption statutes is to protect the best interests of children. In cases where adoption is necessary, this is best accomplished by providing the child with a permanent and stable home, see *In re Adoption of Ridenour* (1991), 61 Ohio St.3d 319, 328, 574 N.E.2d 1055, 1063, and ensuring that the adoption process is completed in an expeditious manner. See *In re Adoption of Baby Girl Hudnall* (1991), 71 Ohio App.3d 376, 380, 594 N.E.2d 45, 48. If these goals are met, the new parent-child relationship will have the best opportunity to develop fully.

In balancing the rights of a putative father and the state's interest in protecting the welfare of children, the legislature has enacted a statutory scheme where putative fathers are given the right to contest an adoption by filing an objection with the appropriate authority. In the absence of the objection required under R.C. 3107.07(B), a court lacks any indication of the putative father's full commitment to the responsibilities of parenthood. Where

a putative father fails to demonstrate such a commitment, the state should not be compelled to listen to his opinion of where the child's best interests lie. See *Lehr* at 262, 103 S.Ct. at 2993-2994, 77 L.Ed.2d at 627.

Johnson urges this court to accept the appellate court's holding that his conditional consent to the adoption suffices as the objection required under R.C. 3107.07(B).[1] We cannot accept such a proposition. By attempting to preserve twenty hours of visitation rights per month, Johnson was, in effect, attempting to retain parental rights and privileges while agreeing to dispense with the attendant parental obligations and duties. Because the relationship that Johnson attempted to preserve in his conditional consent falls far short of the interest protected under statute,[2] we cannot uphold the appellate court's finding.

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[1] Johnson additionally asserts that his motion for relief from judgment regarding the interlocutory order should be considered as a written objection under R.C. 3107.07(B). However, this too does not constitute an "objection" as contemplated in that statute.

[2] A court is without authority to incorporate visitation rights in favor of any biological relative into any final decree of adoption or an interlocutory order of adoption that has become final. Such prohibition is found in R.C. 3107.15(A)(1), which states:

"A final decree of adoption and an interlocutory order of adoption that has become final, issued by a court of this state, shall have the following effects as to all matters within the jurisdiction or before a court of this state:

"(1) Except with respect to a spouse of the petitioner and relatives of the spouse, to relieve the biological or other legal parents of the adopted person of all parental rights and

While strict adherence to the procedural mandates of R.C. 3107.07(B) might appear unfair in a given case, the state's interest in facilitating the adoption of children and having the adoption proceeding completed expeditiously justifies such a rigid application. See *Lehr*, 463 U.S. at 265, 103 S.Ct. at 2995, 77 L.Ed.2d at 629.

II

Johnson next argues that even if we find that his conditional consent does not constitute an objection to the adoption as required under R.C. 3107.07(B), we nevertheless should affirm the appellate court's decision because the proceedings conducted by the probate court denied him his due process rights. Specifically, Johnson argues that he was entitled to notice and a hearing prior to the probate court's finalization of the adoption that deprived him of a right to visitation.

R.C. 3107.15(A)(1) prohibits a court from granting visitation rights to a biological relative that survive a final decree of adoption. In *Ridenour, supra*, we commented upon the legislative purpose behind such a proscription as follows:

"* * * R.C. 3107.15 reflects the legislature's intent to find families for children. If preconditions are imposed on the adoptive parent-child relationship, or if adoptive

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responsibilities, and to terminate all legal relationships between the adopted person and his relatives, including his biological or other legal parents, so that the adopted person thereafter is a stranger to his former relatives[.]"

parents are forced to agree to share parenting responsibilities with people whom they do not know, many potential adoptive parents will be deterred from adopting. Moreover, even where adoptive parents consent to visitation by biological relatives whom they do not know, such an arrangement is bound to be stressful for the child[.]" *Id.*, 61 Ohio St.3d at 328, 574 N.E.2d at 1063. Accordingly, Johnson cannot rely on Ohio's adoption statutes to demonstrate his right to notice and a hearing on issues of visitation surviving the final decree of adoption.

In determining whether the court's action with regard to Johnson constitutes an infringement of his due process rights, we must identify the nature of the private interest claimed by Johnson and determine whether that interest is constitutionally protected. See *Lehr*, 463 U.S. at 256, 103 S.Ct. at 2990, 77 L.Ed.2d at 623. It is a well-established principle that the relationship between parent and child is a constitutionally protected liberty interest. *Quilloin v. Walcott* (1978), 434 U.S. 246, 255, 98 S.Ct. 549, 554, 54 L.Ed.2d 511, 519. As stated by the United States Supreme Court in *Lehr* at 257-258, 103 S.Ct. at 2991, 77 L.Ed.2d at 624, " 'the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' '[S]tate intervention to terminate [such a] relationship * * * must be accomplished by procedures meeting the requisites of the Due Process Clause.' " (Citations omitted.) While these protections have been extended to biological fathers of children regardless of marital status, such protection is dependent upon the biological father's "full commitment to the

responsibilities of parenthood[.]" *Id.* at 261, 103 S.Ct. at 2993, 77 L.Ed.2d at 626.

Accordingly, a potential parent-child relationship is accorded a degree of constitutional protection under the Due Process Clause; if a biological father comes forward and accepts the full responsibilities of parenthood, he will be extended full protection of that relationship under that clause. If the biological father fails to accept the responsibilities of parenthood, no continuing constitutionally protected interest will be recognized from the mere existence of a biological link.

Having delimited the precise nature of the constitutionally protected interest related to a potential parent-child relationship, we must determine whether that interest has been adequately protected.

"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' " *Mathews v. Eldridge* (1976), 424 U.S. 319, 333, 96 S.Ct. 893, 902, 47 L.Ed.2d 18, 32, quoting *Armstrong v. Manzo* (1965), 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62, 66. The question in our case then becomes whether Johnson was given adequate notice and opportunity to be heard with respect to his commitment to accepting parental responsibility for his child.

The procedures currently in place under Ohio law adequately protect a biological father's constitutionally protected right. If a biological father undertakes any of the actions set forth in R.C. 3107.06(F)(1) through (3), he may file an objection to the adoption, thereby making his

consent necessary under R.C. 3107.06.[3] If such an objection is made, the court may enter a decree of adoption *only* upon finding, after proper notice and hearing, that (1) the putative father is not the father of the minor, or (2) that he has willfully abandoned or failed to care for and support the minor, or (3) that he abandoned the mother of the minor during pregnancy and up to the time of her surrender of the child or its placement in the home of the petitioner, whichever occurs first. R.C. 3107.07(B). If the objection is not made after proper notice, the putative father's consent becomes unnecessary. *Id.*

After placement of the child with Zschach on November 24, 1992, the probate court set a hearing on the adoption petition for December 24, 1992. The hearing was conducted and the court issued an interlocutory order of adoption. Johnson does not allege a notice deficiency with respect to the December 24 hearing. Nevertheless, Johnson failed to file a written objection to the adoption as required by R.C. 3107.07(B).

Because Johnson was afforded the opportunity to object to the adoption of his putative child pursuant to Ohio's adoption statute, but failed to so object and thereby demonstrate his full commitment to the responsibilities of parenthood, we find that Johnson's constitutionally protected interests were adequately safeguarded.

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[3] If a putative father has not undertaken any of the actions contemplated in R.C. 3107.06(F)(1) through (3), he may still take advantage of R.C. 3107.06(F)(4) to contest the adoption of his offspring.

Any interest asserted by Johnson regarding the preservation of visitation rights surviving the adoption does not invoke the protections of the Due Process Clause.

III

Appellees also argue that other errors in the adoption proceeding rendered the trial court's final decree of adoption invalid and, thus, support the appellate court's judgment. These other alleged errors were adjudged moot by the appellate court in light of its finding that Johnson's conditional consent was tantamount to a written objection. Accordingly, we will pass upon these remaining issues.

A

Johnson and Barnebey argue that the trial court erred in issuing a final decree of adoption because the initial placement of the child with Zschach without agency involvement or court approval was contrary to R.C. 5103.16[4] and obligated the court

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[4] R.C. 5103.16 states in pertinent part:

"(A) Except as otherwise provided in this section, no child shall be placed or accepted for placement under any written or oral agreement or understanding that transfers or surrenders the legal rights, powers, or duties of the legal parent, parents, or guardian of the child into the temporary or permanent custody of any person * * * without the written consent of the department, or by a commitment of a juvenile court, or by a commitment of a probate court as provided in this section. * * *"

to dismiss the adoption petition pursuant to R.C. 3107.14(D).[5]

Neither Johnson nor Barnebey argue that the November 24, 1992 placement of the child with Zschach fell short of the procedural mandates contained in R.C. 5103.16. Rather, Johnson and Barnebey claim that their own act of "placing" the child with Zschach on October 17, 1992, and leaving the child in Zschach's primary care until the child was formally placed with Zschach by the court violates R.C. 5103.16. That statute prohibits the placement or acceptance of a child under an agreement that transfers the legal rights of parents to another without the written consent of the department of human services or commitment by a court. Johnson and Barnebey then point to R.C. 3107.14(D) for the proposition that the probate court was required to dismiss the adoption petition as a result of the "illegal placement."

While we have held that adoption statutes are in derogation of common law and therefore must be strictly construed, *Lemley v. Kaiser* (1983), 6 Ohio St.3d 258, 260, 6 OBR 324, 326-327, 452 N.E.2d 1304, 1307, strict construction does not require that we interpret statutes in such a

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[5] R.C. 3107.14(D) states:

"If the requirements for a decree under division (C) of this section have not been satisfied or the court vacates an interlocutory order of adoption, or if the court finds that a person sought to be adopted was placed in the home of the petitioner in violation of law, the court shall dismiss the petition and may determine the agency or person to have temporary or permanent custody of the person, which may include the agency or person that had custody prior to the filing of the petition or the petitioner[.]"

manner that would mandate an unjust or unreasonable result. R.C. 1.47(C). Because the interests sought to be advanced by Barnebey and Johnson are not among those that are intended to fall within the protection of R.C. 5103.16,[6] we cannot adopt appellees' suggested statutory interpretation.

In the present case, both Barnebey and Johnson were active participants in the "illegal placement," which they now allege as grounds for dismissal of the adoption petition. In fact, Barnebey first contacted Zschach as "a friend" with respect to the placement of the child after she had engaged in unsuccessful negotiations to place the child with three sets of prospective adoptive parents. Furthermore, prior to formal placement by the court, neither challenged the petition on the grounds that the child had been living with Zschach for a month prior to the hearing.

R.C. 3107.14(D) is not intended to aid the remorseful biological parent in regaining custody of his or her child where that parent places the child in the home of a petitioner, consents to court placement of the child, and offers no objection while the court formally places the child for adoption in compliance with the procedural mandates of R.C. 5103.16. Instead, that portion of R.C.

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[6] 6. In placing their child for adoption in contravention of R.C. 5103.16, both Barnebey and Johnson could be subjected to fines and imprisonment. R.C. 5103.99(B) states:

"Whoever violates section 5103.15, 5103.16, or 5103.17 of the Revised Code shall be fined not less than five hundred nor more than one thousand dollars or imprisoned not more than six months, or both."

3107.14(D) that mandates dismissal of a petition for placements made in violation of the law, together with R.C. 5103.16, is part of a legislative response to the perils of black-market transactions occasioned by the limited supply of and great demand for adoptable babies.

Because the best interest of children is likely to become a subordinate concern where profit-motivated parties become involved in adoptive placement, the legislature enacted R.C. 5103.16 to ensure proper agency or court supervision of private placements. By penalizing parties engaged in such illegal activity and providing the courts with authority to nullify adoptive placements that are neither conducted by an authorized agency nor judicially approved, the legislature has provided probate courts with the tools to deter future violations and to rectify illegal placements injurious to the improperly placed child.

None of these concerns is reflected in appellees' desire to have the adoption petition dismissed.

B

Barnebey additionally argues that the adoption petition should have been dismissed due to the probate court's failure to finalize the interlocutory order within one year of its issuance. In support of her argument, Barnebey cites R.C. 3107.14(C), which states in pertinent part:

"If, at the conclusion of the hearing, the court finds that the required consents have been obtained or excused and that the adoption is in the best interest of the person

sought to be adopted, it may issue * * * a final decree of adoption or an interlocutory order of adoption, which by its own terms automatically becomes a final decree of adoption on a date specified in the order, which shall not be less than six months or more than one year from the date of issuance of the order[.]"

The interlocutory order entered by the probate court in this case was not "an interlocutory order of adoption, which by its own terms automatically [became] a final decree of adoption on a date specified in the order." Rather, the order stated that "this cause is continued until the child has lived in the home of the petitioner for at least six months." Therefore, this interlocutory order is not subject to the statutory language relied on by Barnebey.

The court finalized the adoption exactly fifteen months after the issuance of its interlocutory order. Barnebey's motion to vacate the interlocutory order on grounds that her consent to the adoption was not freely given necessitated the delay in finalizing the adoption. In fact, it was in response to a motion filed by Barnebey that the court stayed any final order of adoption until the other motions before the court had been fully adjudicated. After the court ruled on the motions, it set a date, within one year of the issuance of the interlocutory order, for finalizing the adoption. Again, the process was delayed when Barnebey appealed from the court's adverse ruling on summary judgment and successfully

moved the probate court to stay the adoption proceedings.[7]

We find, therefore, that this claimed error does not support a dismissal of the adoption petition.

IV

To dispose of all issues on appeal, we must determine whether the appellate court acted appropriately when it reversed the probate court's grant of summary judgment in favor of Zschach on the issue of whether Barnebey's consent to the adoption is valid.

Zschach urges that we need not reach the merits of whether summary judgment is appropriate on the issue of Barnebey's consent, asserting that the issue is time-barred pursuant to R.C. 3107.09(A). That division states that "consent to adoption is irrevocable and cannot be withdrawn after the entry of an interlocutory order or after the entry of a final decree of adoption when no interlocutory order has been entered." In support of her argument, Zschach points to the fact that Barnebey's allegations of fraud and undue influence were first asserted with respect to a motion to vacate the interlocutory order.

As we have stated on numerous occasions, parental consent to an adoption order "is [a] jurisdictional prerequisite which, if absent, allows the order to be attacked as

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[7] The court of appeals dismissed Barnebey's appeal for lack of a final appealable order on January 10, 1994. Even at that time, more than one year had elapsed since the probate court's issuance of its interlocutory order.

void. * * * " *McGinty v. Jewish Children's Bur.* (1989), 46 Ohio St.3d 159, 161, 545 N.E.2d 1272, 1274. Furthermore, a valid consent is "one which has been freely, knowingly, and voluntarily given with a full understanding of the adoption process and the consequences of one's actions." *In re Adoption of Infant Girl Banda* (1988), 53 Ohio App.3d 104, 108, 559 N.E.2d 1373, 1378. Accordingly, a valid consent – one that is not the product of fraud, duress, undue influence, or the like – is a jurisdictional prerequisite to the issuance of an adoption order.[8] In *Marich v. Knox Cty. Dept. of Human Serv.* (1989), 45 Ohio St.3d 163, 543 N.E.2d 776, this court considered the effect of undue influence upon a natural parent's consent to a permanent surrender of parental rights. The syllabus of that case stated:

"When a public agency subjects a natural parent, who is a minor, single, and unrepresented by counsel, to undue influence, and as a result of that undue influence, the parent signs an agreement permanently surrendering her child, the parent's consent to the agreement *is invalid and the custody of the child remains with the parent.*" (Emphasis added.)

R.C. 3107.09(B) allows a parent the opportunity to withdraw consent to an adoption that is freely given if that parent demonstrates that withdrawal is warranted and is consistent with the best interest of the child. However, the legislature has limited the time within which a parent can move for withdrawal of a valid consent to

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[8] It is clear that under R.C. 3107.06(A), Barnebey's consent is required as a prerequisite to the probate court's issuance of an order of adoption.

adoption by requiring a motion under R.C. 3107.09(B) to be made prior to the entry of an interlocutory order of adoption or final order of adoption if no interlocutory order is issued.

A collateral attack upon an adoption decree for a court's lack of subject matter jurisdiction is not temporally limited by R.C. 3107.09(B). Instead, the time restriction placed upon such a motion is found in R.C. 3107.16(B). With a few statutorily recognized exceptions, that section provides that "[s]ubject to the disposition of an appeal, upon the expiration of one year after an adoption decree is issued, the decree cannot be questioned by any person * * * in any manner or upon any ground, including fraud, misrepresentation, failure to give any required notice, or lack of jurisdiction of the parties or of the subject matter[.]" Barnebey's motion to vacate the interlocutory order was filed within the time frame permitted under R.C. 3107.16(B).

The two statutes at issue here are reconcilable. R.C. 3107.09(B) applies to the parent who changes his or her mind after giving consent; R.C. 3107.16(B) applies to invalid consents. The legislative approach allows a narrow time frame for the challenge by a remorseful parent wishing to withdraw valid consent, while allowing up to one year after the adoption for a challenge to the legal validity of a consent (*i.e.*, subject matter jurisdiction).

Upon review of the summary judgment proceedings, however, we determine that the trial court correctly disposed of Barnebey's motion to vacate the interlocutory order of adoption. Neither Barnebey's deposition testimony, her affidavit, nor any of the other evidentiary

materials properly before the trial court on summary judgment raise a genuine issue of material fact that Barnebey's consent to the adoption was the product of fraud or undue influence.

"Undue influence" is defined as " '[a]ny improper or wrongful constraint, machination, or urgency of persuasion whereby the will of a person is overpowered and he is induced to do or forbear an act which he would not do or would do if left to act freely.' " *Marich*, 45 Ohio St.3d at 166, 543 N.E.2d at 780, quoting Black's Law Dictionary (5 Ed.1979) 1370. "Fraud" is "[a]n intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right." Black's Law Dictionary (6 Ed.1990) 660. An essential element of fraud is that the action or forbearance resulting in injury is proximately caused by the affected party's justifiable reliance on the false representation or concealment. *Burr v. Stark Cty. Bd. of Commrs.* (1986), 23 Ohio St.3d 69, 23 OBR 200, 491 N.E.2d 1101, paragraph two of the syllabus. Whether a challenge to an adoption consent is based on fraud, undue influence, or some other consent-vitiating factor, the real and ultimate fact to be determined is whether the party affected was denied the exercise of his or her free will. *Tallmadge v. Robinson* (1952), 158 Ohio St. 333, 340, 49 O.O. 206, 209, 109 N.E.2d 496, 500.

The record on summary judgment reveals that, prior to Barnebey's execution of a consent to the adoption, Zschach and Barnebey discussed their concern that the putative father desired to gain exclusive control over the child and their plans for Barnebey's future participation in the upbringing of the child if Zschach was successful

in the adoption. While these factors may have had some influence on Barnebey's decision to execute a consent to the adoption, they did not deprive Barnebey of the exercise of her free will.

The record on summary judgment demonstrates that Barnebey took initial steps to place the child for adoption with three sets of adoptive parents before finally contacting Zschach. Further, in her deposition, Barnebey conceded that her consent to the adoption was executed of her own free will.

Accordingly, we reinstate the trial court's award of summary judgment regarding Barnebey's motion to vacate the interlocutory order of adoption.

V

We reverse the judgment of the court of appeals in all respects.

Judgment reversed.

MOYER, C.J., and GLASSER, J., concur.

DOUGLAS, J., concurs separately.

ALICE ROBIE RESNICK, J., concurs separately.

FRANCIS E. SWEENEY, Sr., J., concurs in judgment only.

PFEIFER, J., dissents.

GEORGE M. GLASSER, J., of the Sixth Appellate District, sitting for WRIGHT, J.

DOUGLAS, Justice, concurring.

Although I do not agree with much of the discussion in Parts I through III of the majority opinion, I concur with the findings of the majority that the putative father did not properly object to the adoption, that the putative father was not deprived of his constitutional right to due process, and that the probate court was not required to dismiss the adoption petition pursuant to R.C. 3107.14(C) and (D). I also concur with the ultimate judgment of the majority reversing the judgment of the court of appeals and reinstating the judgment of the trial court. However, unlike the majority, I would hold that R.C. 3107.09(A) is dispositive of the issue concerning the birth mother's consent to the adoption and, thus, I disagree with the discussion and analysis in Part IV of the majority opinion.

R.C. 3107.09(A) states that "[a] consent to adoption is *irrevocable and cannot be withdrawn* after the entry of an interlocutory order or after the entry of a final decree of adoption when no interlocutory order has been entered." (Emphasis added.) Here, the birth mother raised the issue that her unequivocal written consent to the adoption was induced by fraud, misrepresentation, and undue influence *after* the probate court had entered an interlocutory order placing the child with the adoptive parent. She was too late. After the issuance of the interlocutory order, the birth mother's consent to the adoption was irrevocable.

The majority, however, avoids the clear language of R.C. 3107.09(A) by observing that "parental consent to an adoption order 'is [a] jurisdictional prerequisite which, if absent, allows the order to be attacked as void. * * * ' *McGinty v. Jewish Children's Bur.* (1989), 46 Ohio St.3d 159, 161, 545 N.E.2d 1272, 1274. Furthermore, a valid consent is 'one which has been freely, knowingly, and voluntarily

given with a full understanding of the adoption process and the consequences of one's actions.' *In re Adoption of Infant Girl Banda* (1988), 53 Ohio App.3d 104, 108, 559 N.E.2d 1373, 1378. Accordingly, a valid consent – one that is not the product of fraud, duress, undue influence or the like – is a jurisdictional prerequisite to the issuance of an adoption order. [majority opinion's footnote 8.]" In footnote eight to the majority opinion, the majority says that "[i]t is clear that under R.C. 3107.06(A), Barnebey's [the birth mother's] consent is required as a prerequisite to the probate court's issuance of an order of adoption." What the majority fails to grasp is that the probate court had subject matter jurisdiction in this case because the birth mother had consented to the adoption by filing a written consent form with the probate court. Only after the probate court had issued an interlocutory order did the birth mother seek to attack the voluntary nature of her consent to the adoption. At that point, it was too late for the birth mother to change her mind since, pursuant to R.C. 3107.09(A), her consent to the adoption had become irrevocable.

Next, the majority cites *Marich v. Knox Cty. Dept. of Human Serv.* (1989), 45 Ohio St.3d 163, 543 N.E.2d 776, in support of the proposition that R.C. 3107.09(A) did not preclude the birth mother from challenging her consent to the adoption following the issuance of the interlocutory order. However, *Marich* dealt with an agreement executed by a fifteen-year-old birth mother permanently surrendering a child to a public agency to care for the child and to place the child in a family home. See R.C. 5103.15. There was no adoption proceeding at issue in *Marich* and, obviously, there was no interlocutory or final

order of adoption concerning the *Marich* child. In the case at bar, the birth mother signed a consent to the adoption of her child. Upon issuance of the interlocutory order of adoption, the birth mother was statutorily precluded from withdrawing her consent. See R.C. 3107.09(A). *Marich* indicates nothing to the contrary, and certainly does not support the majority's position concerning the timeliness of Barnebey's (the birth mother's) motion to vacate the interlocutory order of adoption.

Nevertheless, the majority holds that the motion filed by the birth mother challenging the voluntary nature of her consent was timely filed pursuant to R.C. 3107.16(B). This statute provides that "[s]ubject to the disposition of an appeal, *upon the expiration of one year after an adoption decree is issued*, the decree cannot be questioned by any person, including the petitioner, in any manner or upon any ground, including fraud, misrepresentation, failure to give any required notice, or lack of jurisdiction of the parties or of the subject matter[.]" (Emphasis added.) Not surprisingly, none of the parties to this appeal even cites R.C. 3107.16(B). The reason for this should be obvious – R.C. 3107.16(B) is inapplicable on the issue concerning the finality of Barnebey's consent to the adoption. Rather, it is the clear and unambiguous language of R.C. 3107.09(A) which governs the finality of Barnebey's consent. The court of appeals recognized this when it held, on reconsideration, that "[f]ollowing the interlocutory order of adoption in this case, * * * Nan Barnebey filed a motion to withdraw her consent to the adoption. *Ordinarily such a motion would be time barred pursuant to R.C. § 3107.09.* * * * However, as noted above, the interlocutory order in this case was erroneously entered [on the basis

of the court of appeals' finding that the putative father's conditional consent was tantamount to an objection to the adoption]. As such, the natural mother's motion to withdraw her consent to the adoption was not time barred." (Emphasis added.) Given the findings of the majority opinion that the putative father's consent to the adoption was not necessary, it logically follows that the birth mother's consent to the adoption was irrevocable pursuant to R.C. 3107.09(A) and could not be withdrawn following the entry of the interlocutory order of adoption.

ALICE ROBIE RESNICK, Justice, concurring.

I generally agree with the conclusions reached in each part of the majority opinion. I write separately to express my disagreement with portions of the analysis employed by the majority in Part IV of its opinion to reach the conclusion that the trial court properly granted summary judgment in Zschach's favor on Barnebey's motion to vacate the interlocutory order of adoption.

As a necessary consequence of the majority's conclusion that Johnson's attempted conditional consent to the adoption is not equivalent to a written objection, and of the majority's reversal of the court of appeals on that issue, it follows that the trial court's interlocutory order of adoption was not entered erroneously. Thus, the issue concerning Barnebey's consent to the adoption addressed in Part IV of the majority opinion is best approached by asking this question: Under what circumstances, if any, may a valid interlocutory order of adoption be challenged by a birth mother who consented to the adoption?

Zschach contends that, pursuant to R.C. 3107.09(A), once an interlocutory order of adoption is entered, a birth mother's consent to the adoption becomes irrevocable, so that all challenges to the validity of the consent are foreclosed. I do not accept Zschach's position that R.C. 3107.09(A) makes a birth mother's consent unassailable once an interlocutory order is entered. I believe that, even though a birth mother may not "withdraw" her consent after the interlocutory order has been entered, in a limited number of situations a birth mother may seek to "vacate" her consent, despite R.C. 3107.09(A).[9]

If Barnebey had attempted to withdraw her consent prior to the trial court's entry of the interlocutory order, that attempted withdrawal would have been governed by R.C. 3107.09(B). However, since the interlocutory order was already in place when Barnebey first moved to vacate her consent, any concept of "withdrawal" or "revocation" of that consent is conclusively foreclosed by R.C. 3107.09(A). As the court of appeals noted, ordinarily a motion to withdraw consent is time-barred by R.C. 3107.09.

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[9] In a case where a final decree of adoption has been issued, R.C. 3107.16(B) suggests that, in extraordinary circumstances, the decree is subject to challenge on limited grounds for up to one year after the decree has been issued. As R.C. 3107.16(B) uses the words "any person" to refer to the person questioning the final decree, the statute's implication is that a birth parent who seeks to overturn a decree of adoption by vacating a consent on file with the probate court may question even a final decree.

While an attempt to "vacate" a consent may at first glance seem to be the same thing as an attempt to "withdraw" a consent, I believe the two are distinguishable. In a limited number of situations, when certain fundamental irregularities are alleged that may have contaminated the birth parent's consent, the consent will be subject to challenge even though an interlocutory order (and perhaps even a final decree) of adoption have been entered. See, generally, Annotation, What Constitutes "Duress" in Obtaining Parent's Consent to Adoption of Child or Surrender of Child to Adoption Agency (1976 & Supp.1995), 74 A.L.R.3d 527; Annotation, What Constitutes Undue Influence in Obtaining a Parent's Consent to Adoption of Child (1973 & Supp.1995), 50 A.L.R.3d 918; Annotation, Annulment or Vacation of Adoption Decree by Adopting Parent or Natural Parent Consenting to Adoption (1948 & Supp.1996), 2 A.L.R.2d 887. Zschach's proposed absolutist interpretation of R.C. 3107.09(A) would equate a fundamental challenge to irregularities underlying the consent with the type of "change of mind" withdrawal of consent that the statute seems most applicable to. See Annotation, Right of Natural Parent to Withdraw Valid Consent to Adoption of Child (1976 & Supp.1995), 74 A.L.R.3d 421, 436 ("It has been held or recognized in a number of illustrative cases that, at least after the placement of the child, the natural parents may not arbitrarily and without cause withdraw a valid consent to adoption.").

I therefore agree with the majority that R.C. 3107.09(A) is not an absolute bar to an attempt to vacate a consent filed after the entry of an interlocutory order. Unlike the majority, I do not believe that this attempt to

vacate a consent should be approached as a collateral attack on the probate court's subject matter jurisdiction. The probate court had subject matter jurisdiction over this adoption when it entered the interlocutory order. A consent signed by Barnebey was in the court's file, R.C. 3107.06(A) was therefore satisfied, and the probate court could proceed to deal with the adoption petition. The trial court determined that the consent was valid and proceeded accordingly. I do not accept the way the majority quotes selectively from *McGinty v. Jewish Children's Bur.* (1989), 46 Ohio St.3d 159, 161, 545 N.E.2d 1272, 1274, and *In re Adoption of Infant Girl Banda* (1988), 53 Ohio App.3d 104, 108, 559 N.E.2d 1373, 1378, to support its apparent conclusion that a trial court would in hindsight have lacked jurisdiction whenever it allowed an adoption proceeding to go forward based on what was later determined to be an invalid consent.

Since R.C. 3107.09(A) does not stand in the way of the trial court's considering an attempt to vacate consent filed before the entry of a final decree of adoption, such a consideration is within the scope of the court's continuing jurisdiction. The attack is on the consent itself, and ultimately on the interlocutory order of adoption based on the allegedly tainted consent. The attack is not on the jurisdiction of the court.

Recognizing that a consent may be challenged when, as here, an interlocutory decree of adoption has been entered does not mean that a consent will be easily vacated. As mentioned above, a consent to an adoption may not be "withdrawn" in such a situation, and may be

challenged only when extraordinary irregularities surrounded the consent. Furthermore, the burden on a person seeking to vacate his or her consent to an adoption after the child has been placed in the adoptive home must be a heightened one, because the child will have begun to bond with the adoptive parent or parents. Finally, the policy favoring finality of adoptions running throughout R.C. Chapter 3107 militates against a successful challenge to the consent. See, *e.g.*, R.C. 3107.15(A)(1), which provides that a final decree of adoption relieves the biological parents "of all parental rights and responsibilities" and terminates legal relationships between the adopted person and the biological parents "so that the adopted person thereafter is a stranger to his former relatives * * * ."

In light of the foregoing considerations, I agree that the trial court ruled properly when it granted summary judgment in favor of Zschach on Barnebey's motion to vacate the interlocutory order based on Barnebey's allegedly tainted consent to the adoption. In addition to the factors cited by the majority to support its conclusion that the trial court ruled correctly on this issue, I am particularly struck by several additional facts surrounding Barnebey's allegedly "involuntary consent." At the time of the consent, Barnebey was over forty years of age. In a deposition contained in the record of this case dated May 6, 1993, Barnebey stated that she has a bachelor of science degree in ceramic engineering and a bachelor of arts degree in liberal studies, and also that she pursued a course of study in welding engineering in graduate school at Ohio State University for two additional years. Barnebey was a mature, educated woman at the time of

the consent, and as such can be deemed to have appreciated the consequences of consenting to the adoption.

PFEIFER, Justice, dissenting.

Millennia after Solomon, judges are still put in the difficult position of deciding who is to be awarded custody of children. Unlike Solomon, today's judges cannot base their decisions only on fundamental fairness. If we were able to do the fair thing in this case, it would be to order the parties to carry out the agreement they originally intended – custody to the adoptive parent with visitation by the natural parents. However, Ohio does not recognize "open" adoptions – pursuant to R.C. 3107.15(A)(1), biological parents lose all parental rights when their child is adopted. That is a fundamental fact which somehow escaped the knowledge of the parties, their lawyers, and the probate judge early on in this case. Other complicating factors are that the parties know each other, that they circumvented the legal process in originally placing the child, and that litigation begun in the child's infancy continues without final resolution well into her fourth year. Thus, we are forced to fit this most unusual scenario into a statutory scheme with "one size fits all" rules.

I dissent from the majority's holding that no genuine issues of fact remain as to whether Zschach gained Barnebey's consent through fraud or undue influence. I agree with the court of appeals that Barnebey deserves a hearing before a trier of fact on that most important issue. According to Barnebey's deposition and affidavit testimony, she sought Zschach's help only because she feared that Johnson might take the child and move out of state.

It was Barnebey's fear of not being able to see her daughter which set the series of events in motion. Zschach played on Barnebey's fears about Johnson, and persuaded Barnebey to let the child stay with her, where Johnson would not be able to find her. Barnebey claims that she consented to the adoption only because Zschach agreed to allow Barnebey and her other children be a part of the baby's life. The agreement apparently was that Barnebey and her children would be referred to as the baby's aunt and cousins. Barnebey believed she was consenting to an open adoption.

Barnebey's testimony, when viewed in a light most favorable to her, raises genuine issues of fact as to whether her consent was fraudulently induced. This case, one dealing with the most important of rights, was mishandled and too cavalierly dispensed with from the start. Barnebey deserves at least a hearing before a trier of fact.

I also dissent from the majority opinion in regard to Johnson. I agree with the court of appeals that Johnson's insistence on post-adoption visitation was tantamount to a written objection to the adoption. By conditioning his consent on visitation rights, Johnson, in writing, indicated that he did not consent to a legal adoption. Johnson's qualified consent was apparently accepted by the probate court, which then later told Johnson, in effect, that his qualified consent was meaningless. The whole adoption took place because of everyone's mistaken belief of what the law allows. Johnson should not be the party who pays for that misunderstanding.

This case belongs back where it started, in the probate court. This time, the natural parents' decision

whether to consent to the adoption should be made with a full understanding of what their consent means.

After a three-year court battle, the double life of the little girl known to some as GlenNoel Zschach and to others as Cybele Johnson remains unsettled. Her gut-wrenching saga offers an important lesson about adoption in Ohio – that the desire for nonstranger, "open" adoptions is real, and that our laws in that area are inadequate. I would allow parties to a nonstranger adoption to enter into a separate contract setting forth terms of visitation, and would grant probate judges the discretion to determine if that agreement is in the best interest of the child.

In re ADOPTION OF ZSCHACH.

Nos. 1994CA-14, 1994CA-19.
Court of Appeals of Ohio,
Fairfield County.

Decided Dec. 20, 1994.

PER CURIAM.

The within matter again presents itself to this court pursuant to appellee Mary Lou Zschach's application for reconsideration of our opinion filed November 14, 1994. Upon consideration of that motion, we grant same and reconsider our opinion as follows:

II, III, and VI

Through her second, third and sixth assigned errors, appellant Nan Barnebey, the natural mother of Glennoel Gretchen Reah Zschach ("minor child"), challenges the procedural aspects of the interlocutory and final order of adoption.

We adhere to our prior decision that these assigned errors are moot. App.R. 12(A)(1)(c), as amended July 1, 1992, grants this court specific authority to enter such a ruling. Appellee's argument to the contrary is based on antiquated law.

These assigned errors are moot because the probate court had no authority to enter a final decree of adoption or an interlocutory order of adoption absent the required consents having been obtained. As found in our original opinion in this matter, which likewise we adhere to, Stephen Reah Johnson, the putative father of the minor child who signed the birth certificate, objected to the within adoption.

Accordingly, we overrule appellant mother's second, third and sixth assigned errors.

I

Through her first assigned error, appellant Nan Barnebey maintains the probate court erred in granting appellee's motion for summary judgment on the issue of whether appellant Nan Barnebey's consent to the adoption was procured by fraud, misrepresentation, and/or undue influence.

When determining a motion for summary judgment, "the inferences to be drawn from the underlying facts contained in the affidavits and other exhibits must be viewed in the light most favorable to the party opposing the motion, and if when so viewed reasonable minds can come to different conclusions the motion should be overruled." *Hounshell v. Am. States Ins. Co.* (1981), 67 Ohio St.2d 247, 433, ___ O.O.3d ___, ___, ___ N.E.2d ___, ___; see also, Civ.R. 56. Summary judgment proceedings present an appellate court the unique opportunity of reviewing the evidence in the same manner as the trial. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 36, 30 OBR ___, ___, ___ N.E.2d ___, ___.

Following the interlocutory order of adoption in this case, appellant Nan Barnebey filed a motion to withdraw her consent to the adoption. Ordinarily, such a motion would be time barred pursuant to R.C. Sec. 3107.09. That section provides, in pertinent part, that "[a] consent to adoption is irrevocable and cannot be withdrawn after the entry of an interlocutory order." However, as noted above, the interlocutory order in this case was erroneously entered. As such, the natural mother's motion to

withdraw her consent to the adoption was not time-barred.

Upon review of the evidence in favor of and in opposition to appellee's motion for summary judgment, we find that genuine issues of material fact exist as to whether appellee exerted undue influence upon appellant Nan Barnebey in order to procure her consent to the adoption. We further find that sufficient evidence, when viewed in the light most favorable to appellant, raises genuine issues of material fact as to whether the natural mother's consent was fraudulently induced. According to appellant's affidavit and deposition, appellee played upon appellant's worst fears that the putative father of the minor child would gain custody of the child unless appellant consented to the adoption. Appellant further stated that appellee made false promises of continued visitation with the minor child, which promises appellant relied on in giving her consent.

Accordingly, the trial court erred in summarily determining pursuant to Civ.R. 56 that appellant Nan Barnebey's consent was not procured through undue influence and/or fraud.

Appellant's first assigned error is hereby sustained.

V

Through her fifth assigned error, appellant Nan Barnebey asserts that the trial court erred in imposing Civ.R. 11 sanctions against her.

We overrule this assigned error for appellant's failure to identify in the record the error on which the assignment of error is based. See App.R. 12(A)(2).

IV

Through her fourth assigned error, appellant Nan Barnebey maintains that the consent of Johnson, the putative father of the minor child who signed the birth certificate, was void.

We sustain this assigned error for the reasons stated above and in our original opinion in this matter.

For the foregoing reasons, the judgment entered in the Fairfield County Court of Common Pleas, Probate Division, is reversed in part and affirmed in part.

Judgment accordingly.

GWIN, WILLIAM B. HOFFMAN and READER, JJ., concur.

In re ADOPTION OF ZSCHACH.(*)

Nos. 1994-CA-14, 1994-CA-19.
Court of Appeals,
Fairfield County.

Decided Nov. 14, 1994.

Ellen L. Wristen, Columbus, for appellant, natural mother, Nan Barnebey.

Arthur H. Thomas, Jr., Worthington, for natural father, Stephen Johnson.

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* Reporter's Note: A discretionary appeal to the Supreme Court of Ohio was not allowed in (1995), 71 Ohio St.3d 1503, 646 N.E.2d 1127.

James C. Aranda, Lancaster, for appellee Mary Lou Zschach.

GWIN, Presiding Judge.

Nan Barnebey, the natural mother of Glennoel Getchen Reah Zschach ("minor child"), and Stephen Reah Johnson, the putative father of the minor child, appeal from the judgment entered in the Fairfield County Court of Common Pleas, Probate Division, granting Mary Lou Zschach's petition to adopt the minor child. The natural mother and putative father raise separate assignments of error, most of which challenge the probate court's finding that their consent to the adoption were valid.

On November 24, 1992, Mary Lou Zschach ("Zschach") petitioned the Fairfield County Probate Court for permission to adopt the aforementioned minor child, who was born on July 24, 1992. As part of her petition, Zschach filed two documents entitled "Consent to Adoption." The first document was executed by Nan Barnebey, the natural mother of the minor child, and it provided that she unconditionally consented to the subject adoption. The second document was executed by Stephen Reah Johnson, the putative father who signed the birth certificate of the child as an informant as provided in R.C. Sec. 3705.09, and it provided:

"Stephen Reah Johnson represents that he is qualified to consent to the adoption of [minor child], and the undersigned hereby consents to the adoption of the child as proposed in the petition.

"This consent is conditioned upon the undersigned father of the minor child being granted visitation rights

with the minor child to include at least twenty hours (20) per month in the Final Decree of Adoption. In the event that said Decree of Adoption does not award said visitation rights, this consent shall be null and void."

Although there is no statutory or common-law authority that recognizes a written consent to adoption conditioned upon visitation as a valid consent, the probate court accepted the consent. In fact, the court in its interlocutory order of adoption stated "that the birth father, Stephen Reah Johnson, shall be granted visitation rights with the minor child to include at least twenty (20) hours per month, the exact times to be arranged by agreement with the adoptive parent."

By judgment entered March 24, 1994, the probate court issued an order finalizing the adoption of the minor child by Zschach. This final order did not award Johnson visitation rights with the adopted child.

I

The predominate issue presented in this case is the legal effect of a written consent to adoption conditioned upon the consenting party's right to continued post-adoption visitation.

Johnson, the putative father who signed the birth certificate of the minor child, is granted the statutory right to withhold his consent to the adoption of the minor child. R.C. Sec. 3107.06(F)(3) provides:

* * * [A] petition to adopt a minor may be granted only if written consent to the adoption has been executed by * * * the putative father * * * [who] has signed the birth

certificate of the child as an informant as provided in section 3705.09 of the Revised Code."

This statutory right of consent was recently recognized by the Ohio Supreme Court:

* * * Unless the statutory consent requirement of R.C. Sec. 3107.06(F)(3) is excused pursuant to R.C. Sec. 3107.07(B), a putative father who has signed the birth certificate of a child as informant as provided in R.C. Sec. 3705.09 has a statutory right to withhold his consent to the adoption of that child, thereby barring the child's adoption by another." *In Re Adoption of Greer* (1994), 70 Ohio St.3d 293, 638 N.E.2d 999, paragraph two of the syllabus.

R.C. Sec. 3107.07(B) provides:

"Consent to adoption is not required of any of the following:

"The putative father of a minor if the putative father fails to file an objection with the court, the department of human services, or the agency having custody of the minor as provided in division (F)(4) of section 3107.06 of the Revised Code, or files an objection with the court, department, or agency and the court finds, after proper service of notice and hearing, that he is not the father of the minor, or that he has willfully abandoned or failed to care for and support the minor, or abandoned the mother of the minor during her pregnancy and up to the time of her surrender of the minor, or its placement in the home of the petitioner, whichever occurs first[.]"

The Supreme Court in *Greer*, supra, held that a putative father's right to withhold consent to the minor

child's adoption can only be preserved if he files a written objection with the court, department of human services or the agency having custody of the child. Id, at paragraph three of the syllabus.

Having determined that Johnson had the right to withhold his consent to the adoption, we must now determine whether he did consent to the adoption or preserved his right to withhold his consent by filing a written objection.

The law as it exists in Ohio prohibits the juvenile court and probate court from ordering post-adoption visitation by the biological family following a stranger adoption. *In Re Adoption of Ridenour* (1991), 61 Ohio St.3d 319, 325, 574 N.E.2d 1055, 1060. This law is based upon the following legislative authority:

"(A) A final decree of adoption and an interlocutory order of adoption that has become final, issued by a court of this state, shall have the following effects as to all matters within the jurisdiction or before a court of this state:

"(1) Except with respect to a spouse of the petitioner and relatives of the spouse, to relieve the biological or other legal parents of the adopted person of all parental rights and responsibilities and to terminate all legal relationships between the adopted person and his relatives, including his biological or other legal parents, so that the adopted person thereafter is a stranger to his former relatives for all purpose including inheritance and the interpretation or construction of documents, statutes, and instruments, whether executed before or after the adoption is decreed, which do not expressly include the

person by name or by some designation not based on a parent and child or blood relationship;

"(2) To create the relationship of parent and child between petitioner and the adopted person, as if the adopted person were a legitimate blood descendant of the petitioner, for all purposes including inheritance and applicability of statutes, documents, and instruments, whether executed before or after the adoption is decreed, which do not expressly exclude an adopted person from their operation or effect." R.C. Sec. 3107.15

Based on the above authority, we find the probate court in this case had no authority to accept Johnson's conditioned consent to adoption. Instead, we find the written consent to adoption conditioned on the right of the putative father to continue post-adoption visitation was tantamount to a written objection to the adoption. The law governing adoptions does not recognize a partial consent to an adoption by one who has a statutory right to withhold such consent.

Accordingly, we reverse the final decree of adoption entered in the Fairfield County Court of Common Pleas, Probate Division, and we remand this cause to that court to proceed with the adoption proceedings anew. This holding renders the remaining assigned errors moot.

Judgment accordingly.

WILLIAM B. HOFFMAN and READER, JJ., concur.

PROBATE COURT OF Fairfield COUNTY, OHIO IN THE MATTER OF THE ADOPTION OF GLENNOEL GRETCHEN REAH ZSCHACH
(Name after adoption)

Case No. 53261 Docket _____ Page _____

ENTRY APPROVING REPORT AND
FINALIZING ADOPTION
(AFTER INTERLOCUTORY ORDER)
(Filed Mar. 24, 1994)

The Court finds that the child has now lived in the home of the petitioner Marylou Zschach for at least six months.

The Court finds that a further report of investigator has been filed herein which report is approved.

It is therefore ordered that a final decree of adoption is entered herein and the name of the child is changed to GLENNOEL GRETCHEN REAH ZSCHACH the full name by which the child shall be know after adoption.

It is further ordered that a Certificate of Adoption, certified by the Court, be forwarded to the State Department of Health, Division of Vital Statistics at Columbus, Ohio.

Further, that a copy of this decree be forwarded to the Ohio Department of Human Services for statistical purposes.

March 24, 1994
Date

/s/ S. Farrell Jackson
Probate Judge

IN THE PROBATE COURT OF FAIRFIELD COUNTY, OHIO

IN THE MATTER OF THE ADOPTION OF	:	
	:	
GLENNOEL GRETCHEN REAH ZSCHACH	:	CASE NO. 53261

MOTION FOR RELIEF FROM JUDGMENT
(Filed Dec. 28, 1993)

Now comes the natural father of the child who is the subject of this adoption, Stephen Johnson, through his attorney, and moves the Court for relief from the Interlocutory Order issued in this case on December 24, 1993 on especially one and three of the following grounds as specified in Rule 60 of the Ohio Rules of Civil Procedure:

1. Mistake inadvertence, surprise or excusable neglect.

2. Fraud, misrepresentation or other misconduct of an adverse party.

3. Any other reasons justifying relief from the judgment.

Respectfully submitted,

/s/ Arthur H. Thomas, Jr.
Arthur H. Thomas, Jr.
Ohio Supreme Court No. 0026613
Attorney for Stephen Johnson
6660 North High Street
P.O. Box 766
Worthington, Ohio 43085-0766
614/846-5080

MEMORANDUM IN SUPPORT OF MOTION

Stephen Johnson is the father of the child whose adoption is sought in the within case who was named at birth, Cybele Reah Johnson, and was born on July 24, 1992.

It is with much hesitation that Stephen Johnson becomes involved in this action, and he does so at this point in time only out of fear that time limitations will prevent him from protecting his rights in the future. He does so further, at this at this [sic] point in time, only out of surprise at the continuation of the conflict between the litigants and to protect his rights to continue his relationship with his daughter.

Movant would still prefer to see this conflict resolved through mediation so that the child and all else concerned could be removed from the distressing atmosphere of the battle as it currently exists.

Movant was present at the birth of the child. He has always desired to maintain a continuing relationship with the child and did so prior to the concealment of the child with the petitioner herein. In fact, on two occasions he had sole possession of the child for several days, one being approximately for ten days. Ever since the birth of the child he has been subjected to extreme pressure by the birth mother to have the child adopted or to agree to marry her.

Movant finally conditionally consented to the adoption, only under extreme pressure. He was assured by Nan Barnebey that the petitioner wanted the baby to know him as her father and with the understanding that

Nan Barnebey and her children would continue a relationship with the child.

It was only after the Interlocutory Order of December 24, 1992 that movant discovered that there was a dispute between the adopting mother and the natural mother, which then resulted in the present litigation. Movant has continued to exercise his visitation during the period of time this litigation has been going on.

Movant has been advised through his counsel that petitioner's counsel appears not to recognize movant's right of visitation and appears to be taking the position that even though the Court accepted the conditional consent it is invalid to the extent that the movant-father cannot be awarded visitation rights by the Final Adoption Decree. It is out of concern over the ambiguity of petitioner's position with regard to visitation that movant moves the Court for relief from the Interlocutory Order pending resolution of the question of visitation.

The consent of the movant was clearly conditioned on his being allowed visitation. If, in fact, he cannot be legally allowed visitation, there was clearly a mistake inadvertence, surprise or excusable neglect and misrepresentation and other reasons justifying relief from judgment.

/s/ Arthur H. Thomas, Jr.
Arthur H. Thomas, Jr.
Ohio Supreme Court No. 0026613
Attorney for Stephen Johnson

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for Relief from Judgment and Memorandum in Support of Motion was mailed to James C. Aranda, Attorney for Petitioner, Marylou Zschach, at Stebelton, Aranda & Snider, P.O. Box 130, Lancaster, Ohio 43130, and Ellen Wristen, Attorney for Nan Barnebey, natural mother, at Wristen & Ucker Co., LPA, 171 East Livingston Avenue, Columbus, Ohio 43215, this 27th day of December, 1993.

/s/ Arthur H. Thomas, Jr.
Arthur H. Thomas, Jr.
Ohio Supreme Court No. 0026613
Attorney for Stephen Johnson

IN THE PROBATE COURT OF FAIRFIELD COUNTY, OHIO

IN THE MATTER OF:	:	
THE ADOPTION OF	:	
GlenNoel Gretchen Reah Zschach	:	Case No. 53261

INTERLOCUTORY ORDER OF ADOPTION
(Filed Dec. 24, 1992)

This day this matter came on to be heard on the Petition of Marylou Zschach for the adoption and change of name of the child being adopted and the Court finds that notice thereof has been given to all parties in interest; and that all consents have been filed herein or have been found unnecessary.

The Court further finds that the allegations in the petition are true; that the child has been placed in the home of the Petitioner by the Fairfield County Probate Court; that the child has resided for a period of time in the home of the Petitioner, in accordance with the laws relating to the placement of children; that the petitioner is suitably qualified to care for and rear the child; and that the best interests of the child will be promoted by the adoption.

Therefore, the Court hereby enters an interlocutory order of adoption; that henceforth, subject to the final decree of the Court, the child shall have the status of the adopted child of the petitioner; and this cause is continued until the child has lived in the home of the petitioner for at least six months pursuant to R.C. 3107.13.

It is further Ordered that the birth father, Stephen Reah Johnson, shall be granted visitation rights with the minor child to include at least twenty (20) hours per month, the exact times to be arranged by agreement with the adoptive parent.

It is further Ordered that the investigator shall make and file a further report of investigation.

Date: _____

_____
JUDGE JACKSON
PROBATE JUDGE

IN THE PROBATE COURT OF FAIRFIELD COUNTY, OHIO

IN THE MATTER OF
THE ADOPTION OF

CYBELE REAH JOHNSON CASE NO. 53281

CONSENT TO ADOPTION
(Filed Nov. 24, 1992)

The undersigned Stephen Reah Johnson represents that he is qualified to consent to the adoption of Cybele Reah Johnson, and the undersigned hereby consents to the adoption of the child as proposed in the petition.

This consent is conditioned upon the undersigned father of the minor child being granted visitation rights with the minor child to include at least twenty hours (20) per month in the Final Decree of Adoption. In the event that said Decree of Adoption does not award said visitation rights, this consent shall be null and void.

The undersigned further states that this consent is voluntarily executed.

/s/ Stephen Reah Johnson
Stephen Reah Johnson

STATE OF OHIO

SS:

COUNTY OF FRANKLIN

Stephen Reah Johnson, being duly sworn, says that the statements contained in the foregoing consent are true, as be verily believes, and that the filing of the

foregoing consent is his voluntary act and deed for the uses and purposes herein mentioned.

/s/ Stephen Reah Johnson
Stephen Reah Johnson

Sworn to before me and subscribed in my presence this 23rd day of November, 1992.

/s/ S. Farrell Jackson
Notary Public

Reg. Dist. No. 23
Primary Reg. Dist. No. 2300
Registrar's No. 000828

Ohio Department of Health
VITAL STATISTICS
CERTIFICATE OF LIVE BIRTH

Birth No. 134—

CHILD

1. CHILD - NAME: CYBELE REAH JOHNSON
2. SEX: FE
3a. DATE OF BIRTH: July 24, 1992
3b. TIME OF BIRTH: 9:15 A.
4a. FACILITY NAME: 5580 Winchester Southern Rd.NW
4b. CITY, VILLAGE OR LOCATION OF BIRTH: Canal Winchester
4c. COUNTY OF BIRTH: Fairfield
5. PLACE OF BIRTH: ☐ Hospital ☐ Freestanding Birthing Center ☐ Clinic/Doctor's Office ☒ Residence ☐ Other (Specify)
6. REGISTRAR'S SIGNATURE: Linda A. Strahm
7. DATE FILED BY REGISTRAR: 10-9-92

CERTIFICANT

8a. I certify that the above named child was born alive at the place and time and on the date stated above. SIGNATURE: Stephen Reah Johnson
8b. DATE SIGNED: 10-8-92
8c. ATTENDANT: ☐ M.D. ☐ D.O. ☐ C.N.M. ☐ Other (Specify) ☒ Other (Specify) Father
8d. ATTENDANT - NAME (Type or Print): Stephen R. Johnson
8e. MAILING ADDRESS (Street or R.F.D. No., City or Village, State, ZIP): 5580 Winchester Southern Rd.NW 43110

MOTHER

9a. MOTHER'S NAME (First, Middle, Last): Nan Barnebey
9b. MAIDEN SURNAME: Barnebey
10a. DATE OF BIRTH: 1-29-52
10b. A: 40
11. BIRTHPLACE (State or Foreign Country): Pittsburgh, PA
12a. RESIDENCE - STATE: Ohio
12b. COUNTY: Fairfield
12c. CITY, TOWN, OR LOCATION: Canal Winchester
12d. STREET AND NUMBER: 5580 Winchester Southern Rd.NW
12e. INSIDE CITY LIMITS? (Yes or No): No
13. MOTHER'S MAILING ADDRESS (If same as residence, enter zip code only): 43110

FATHER

14. FATHER'S NAME (First, Middle, Last): Stephen Reah Johnson
15a. DATE OF BIRTH: 4-23-43
15b. AGE: 49
16. BIRTHPLACE (State or Foreign Country): Columbus, OH

SIGNATURE

17. I certify that the personal information provided on this certificate is correct to the best of my knowledge and belief. Name or Signature of Parent or Other Informant: Stephen Reah Johnson

I hereby certify that this is an exact and true copy of a CERTIFICATE OF BIRTH as found in the files of the Lancaster Health Department for:

Cybele Reah Johnson

10/26 1992

Joyce A. Barnhart
Dep. Registrar of Vital Statistics

THIS IS NOT A VALID COPY WITHOUT THE EMBOSSED SEAL

App. 52

BEST AVAILABLE COPY

No. 96-526

Supreme Court, U.S.
FILED
NOV 4 1996

In The

Supreme Court of the United States

October Term, 1996

STEPHEN JOHNSON,

Petitioner,

vs.

MARYLOU ZSCHACH,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

RESPONDENT'S BRIEF IN OPPOSITION

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Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

QUESTIONS PRESENTED

1. Whether a putative father's right to due process of law is violated when, pursuant to Ohio law, an adoption is finalized due to his conditional consent and failure to file a written objection to the adoption.

2. Whether a putative father's right to due process of law is violated when the probate court enters a final adoption decree without visitation rights because the putative father has given a conditional consent and failed to object to the adoption.

3. Whether a putative father's right to equal protection is violated when he has failed to demonstrate a full commitment to parenthood and a written objection is required.

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APPENDIX

Appendix A — Judgment of the Probate Court of Fairfield County, Ohio Filed August 30, 1993	1a

Respondent Marylou Zschach respectfully requests that this Court deny the Petition for writ of certiorari filed in this action by the putative father, Stephen Johnson, who failed to file a written objection to the adoption.

OPINIONS BELOW

Petitioner Stephen Johnson ("Petitioner") seeks a writ of certiorari to review the decision of the Ohio Supreme Court reversing the Fifth District Court of Appeals. Petitioner's Appendix at 2-33. The Court of Appeals held that Petitioner's conditional consent to the adoption was "tantamount" to a written objection. Pet. App. at 37-42. On June 6, 1996, the Ohio Supreme Court reversed, finding that Petitioner failed to object and thereby failed to demonstrate a full commitment to parenthood. 75 Ohio St. 3d 648, 665 N.E. 2d 1070 (1996); Pet. App. at 2-33. On July 3, 1996 the Ohio Supreme Court denied reconsideration. 76 Ohio St. 3d 1410 (1996); Pet. App. at 1.

STATEMENT OF JURISDICTION

Respondent agrees that this Court has jurisdiction pursuant to 28 U.S.C. § 1257(a) (1996).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner purports to challenge Ohio Revised Code §§ 3107.06 and 3107.07 pursuant to the Fifth Amendment to the Constitution of the United States and the Fourteenth Amendment to the Constitution of the United States. The full text of these statutes and the constitutional provisions are accurately reproduced in Petitioner's Brief at 2-6.

STATEMENT OF THE CASE

Glennoel Zschach (the "child") was born July 24, 1992. She has lived with her adopted mother, Marylou Zschach ("Zschach"), since October 17, 1992 when she was placed with Zschach by the birth mother. The birth mother consented to the adoption. The child is currently in a loving, nurturing home environment.

Petitioner's statement of the case begins with a declaration that is unsupported by the record. Petitioner claims that he is the biological father of the child. Petitioner's Brief at 6. Petitioner has never proven himself to be the biological father of the child. Petitioner is merely a putative father. He was never married to the birth mother and has not attempted to prove his paternity in court.

As putative father, the Petitioner appeared before the probate court on November 23, 1992 and signed a consent to adoption which states,

> CONSENT TO ADOPTION
>
> Stephen Reah Johnson represents that he is qualified to consent to the adoption of [minor child], and the undersigned *hereby consents* to the adoption of the child as proposed in the petition.
>
> This consent is conditioned upon the undersigned father of the minor child being granted visitation rights with the minor child to include at least twenty (20) hours per month in the final decree of adoption. In the event that said decree of adoption does not award visitation rights, this consent shall be null and void.

Pet. App. at 50-51 (emphasis added). Petitioner's consent was drafted by his attorney and he was represented by counsel throughout the proceedings. The birth mother filed a consent to adoption on November 24, 1992 and the probate court approved the placement of the child with Zschach and signed the placement entry the same day.

On December 24, 1992, the probate court entered an interlocutory order of adoption. Pet. App. at 48-49. The interlocutory order found Zschach suitably qualified to care for and rear the child and that the best interests of the child would be promoted by the adoption. Pet. App. at 48. The court noted that "all consents have been filed herein or have been *found unnecessary*." Pet. App. at 48 (emphasis added). In addition, the court granted Johnson twenty hours of visitation per month. Pet. App. at 44.

Approximately six weeks later, on February 11, 1993, the birth mother filed a motion to revoke her consent alleging fraud and undue influence by Zschach. Pursuant to the birth mother's motion to revoke her consent, both parties filed summary judgment motions. On August 30, 1993, the court granted Zschach's motion for summary judgment and denied the birth mother's motion. Respondent's Appendix at 1. In its judgment entry, the Court stated that it "finds no evidence to support the allegations made by Nan Barnebey of fraud, misrepresentation and undue influence." Respondent's Appendix at 1.

Petitioner never demonstrated a full commitment to parenthood. The "facts" Petitioner offers on this issue are inaccurate and unsupported by the record. For example, the facts that he recites regarding his exercise of visitation rights are no more than a quote from his own motion for reconsideration. Pet. Brief at 19-20. His claim that he regularly exercised visitation is also without record support. Pet. Brief at

8. These "facts" were never adjudicated and never the subject of testimony. The fact is, Petitioner did visit Respondent while she had custody of the child, but his purpose was to express affection for the adoptive mother, not to visit the child. Similarly, Petitioner's claim that he consented only because of duress from the birth mother is inaccurate and unsupported by the record. Pet. Brief at 7. Petitioner appeared before the trial court and filed his conditional consent. There is no record evidence that he was subject to duress.

On March 24, 1994 the probate court signed the adoption certificate of the child so that she was legally adopted by Zschach. Pet. App. at 43. On April 21, 1994, the birth mother filed a motion to set aside the entry and notice of appeal of the entry finalizing adoption. Petitioner also appealed.

On November 14, 1994 the Court of Appeals entered an opinion which reversed the adoption order of the probate court. Pet. App. at 37-42. The Court of Appeals based its reversal on its finding that Johnson's conditional consent to adoption "was tantamount to a written objection to the adoption." Pet. App. at 42.

On May 5, 1995 the Ohio Supreme Court granted jurisdiction to hear Ms. Zschach's appeal. The court reversed the ruling of the Court of Appeals on June 6, 1996 finding that the child had been properly adopted and that Petitioner had failed to object and had thereby lost his right to contest the adoption. *In re Adoption of Zschach*, 75 Ohio St. 3d 648, 665 N.E. 2d 1070 (1996); Pet. App. at 2-33. Petitioner and the birth mother filed motions for reconsideration which the Court denied on July 3, 1996. Pet. App. at 1.

REASONS FOR DENYING THE WRIT

Petitioner failed to advance a compelling argument for this Court to grant a writ of certiorari to review the Ohio Supreme Court's decision. Petitioner claims that he was denied due process in the adoption proceeding. The Ohio Supreme Court reviewed that issue and specifically found that Petitioner received due process and that his inaction could not serve to invalidate the adoption under Ohio law. *In re Adoption of Zschach*, 75 Ohio St. 3d at 652-54, 665 N.E. 2d 1070, 1074-75 (1996). This case does not raise an important federal question that must be settled by this Court, but rather involves a proper application of Ohio law by the Ohio Supreme Court. *See* Rules of the Supreme Court of the United States, Rule 10.

Petitioner further argues that he was denied equal protection due to the fact that he was treated differently than the birth mother. Of course, Ohio has sufficient justification for treating a *putative* father, who has not demonstrated a full commitment to parenthood, differently than a custodial birth parent. Petitioner fails to recognize that he is merely a putative father of the adopted child. He never attempted to establish paternity and he never cared for the child in a custodial parental manner.

Petitioner was provided more than adequate opportunity to object to the adoption. Petitioner appeared personally before the trial court and consented to the adoption, albeit conditionally. The Petitioner was granted full opportunity to object to the adoption throughout the course of the proceedings, but he never did so. Accordingly, the Ohio Supreme Court properly applied Ohio law which mandates that a putative father must file a written objection to adoption to establish a right to withhold consent. The issues raised by Petitioner are state law issues and do not warrant review by the United States Supreme Court.

I.

PETITIONER'S CONSENT IS NOT REQUIRED BECAUSE HE IS MERELY A PUTATIVE FATHER WHO FAILED TO FILE A WRITTEN OBJECTION.

The Ohio Supreme Court properly followed the dictates of Ohio law when it ruled that Petitioner's consent was not required. He is the putative father and does not have an absolute right to withhold consent to an adoption. The Ohio Supreme Court was correct in holding that Petitioner's due process interests were adequately protected by Ohio's statutory scheme, that he failed to object and that he received adequate notice to preserve his rights.

A. The Petitioner's Consent Is Not Required.

Petitioner claims that his consent, "was a necessary precondition" to the adoption. Pet. Brief at 12. This simply is not the case. Petitioner's argument is based upon the flawed premise that he is the father of the child. He is not. Petitioner is the putative father and nothing more.

Because Petitioner's paternity has not been established in a judicial proceeding, the necessity of his consent is determined by the statute governing objections by a putative father. *See In re Adoption of Toth*, 33 Ohio App. 3d 265, 515 N.E. 2d 950 (Summit Cty. 1986). Petitioner apparently concedes this point in that his argument is based upon the statutory provisions involving putative fathers.

The Ohio Revised Code provides:

> Unless consent is not required under section 3107.07 of the Revised Code, a

> petition to adopt a minor may be granted only if written consent to the adoption has been executed by all the following:
>
> * * *
>
> (F) Subject to division (B) of section 3107.07 of the Revised Code, the putative father, if he:
>
> * * *
>
> (3) Has signed the birth certificate of the child as an informant as provided in section 3705.09 of the Revised Code.

This statute specifically mandates that its provisions are "[s]ubject to division (B) of section 3107.07 of the Revised Code."

Petitioner misconstrues the Ohio Supreme Court's recent clarification of the relationship of Ohio Revised Code § 3107.06(F) and § 3107.07(B) as they apply to a putative father's attempt to withhold consent for the adoption of an alleged child. The Ohio Supreme Court held that the necessity of obtaining a putative father's consent is not absolute. *In re Adoption of Greer*, 70 Ohio St. 3d 293, 300, 638 N.E. 2d 999 (1994). The requirement of his consent may be excused pursuant to Revised Code § 3107.07 which provides:

> Consent to adoption is *not required* of any of the following:
>
> * * *
>
> (B) The *putative father* of a minor if the

> putative father *fails to file an objection* with the court, the department of human services, or the agency having custody of the minor as provided in division (F)(4) of section 3107.06 of the Revised Code, or files an objection with the court, department, or agency and the court finds, after proper service of notice and hearing, that he is not the father of the minor, or that he has willfully abandoned or failed to care for and support the minor, or abandoned the mother of the minor during her pregnancy and up to the time of her surrender of the minor, or its placement in the home of the petitioner, whichever occurs first.

Ohio Rev. Code Ann. § 3107.07(B) (emphasis added).

In construing the interrelation of the above-quoted statutes, the Ohio Supreme Court held that unless the statutory consent requirement of Revised Code § 3107.06(F)(3) is excused pursuant to Revised Code § 3107.07(B), a putative father who has signed the birth certificate of a child as an informant may have a statutory right to withhold his consent to the adoption of the child, thereby barring the child's adoption by another. *Greer*, 70 Ohio St. 3d at Syllabus ¶ 2. Petitioner's brief is misleading in its contention that a putative father need not comply with § 3107.06(F)(4). The holding in *Greer*, revolved around the court's finding that a father who had signed the birth certificate *was not held to a 30 day limit as provided in § 3107.06(F)(4)*. The putative father still must file a written objection under §3101.07(B).

The Ohio Supreme Court held:

> *To preserve his right* to withhold consent to the child's adoption and avoid a finding that the requirement of his consent shall be excused, a putative father who has signed the birth certificate of a child *must file a written objection* to the adoption with the court, Department of Human Services, or the agency having custody of the child, but that objection need not be filed within thirty days from the earlier of the date of the adoption petition or placement of the child.

Id. at syllabus ¶ 3 (construing Ohio Rev. Code Ann. §§ 3107.06(F)(3) and 3107.07(B)) (emphasis added). A written objection is an essential prerequisite in order for a putative father to preserve his right to contest an adoption.

The Petitioner consented to the adoption. He solely attempted to preserve visitation rights. He did not want full parental rights and obligations. There is a night and day difference between the two concepts.

Petitioner clearly misreads the statutes in arguing that, because he signed the child's birth certificate, he "falls under division (F)(3), and therefore was not subject to R.C. §3107.07(B)." Pet. Brief at 18. This contention flies in the face of the plain language of the statute. Ohio Revised Code §3107.06(F) explicitly states that its provisions are "[s]ubject to division (B) of §3107.07."

Petitioner's argument that he "reasonably relied" upon the representation of the trial court and counsel is not persuasive. Ohio law does not permit open adoptions. Pursuant to Ohio

Revised Code § 3107.15(A)(1) even biological parents lose all parental rights when their child is adopted. Petitioner filed a motion for relief from judgment, through his attorney. His attorney should have been able to inform Petitioner that open adoptions were not the law in Ohio. As the Ohio Supreme Court noted:

> By attempting to preserve twenty hours of visitation rights per month, Johnson was, in effect, attempting to retain parental rights and privileges while agreeing to dispense with the attendant parental obligations and duties. Because the relationship that Johnson attempted to preserve in his conditional consent falls far short of the interest protected under statute we cannot uphold the appellate court's finding.

In re Adoption of Zschach, 75 Ohio St. 3d at 651-652.

B. The Putative Father Has Not Objected to the Adoption and Thus Is Without Standing to Contest the Adoption.

The putative father's failure to file a written objection to the adoption has stripped him of standing to contest the adoption. Petitioner merely submitted to the probate court a consent conditioned upon visitation.

The consent document does not state that without visitation, the putative father objects to the adoption. Rather, the putative father manifested a specific intent to forfeit his parental rights and merely expressed a desire to preserve visitation rights. At the time of the filing of his conditional consent, the putative father was represented by counsel and, in fact, counsel for the putative father drafted the conditional

consent that could not be effective under Ohio law. *See In re Adoption of Ridenour*, 61 Ohio St. 3d 319, 574 N.E. 2d 1055 (1991). The putative father certainly could have objected if that was his intention.

The Ohio Supreme Court fully described why a putative father must object. The Court stated:

> In balancing the rights of a putative father and the state's interest in protecting the welfare of children, the legislature has enacted a statutory scheme where putative fathers are given the right to contest an adoption by filing an objection with the appropriate authority. In the absence of the objection required under R.C. 3107.07(B), a court lacks any indication of the putative father's full commitment to the responsibilities of parenthood. Where a putative father fails to demonstrate such a commitment, the state should not be compelled to listen to his opinion of where the child's best interests lie.

In re Adoption of Zschach, 75 Ohio St. 3d at 651 (citing *Lehr v. Robertson*, 463 U.S. 248, 262 (1983)). The Ohio Supreme Court did not accept Petitioner's contention that his conditional consent suffices as the objection specifically required under R.C. § 3107.07(B). *Id.* The Court further noted that Petitioner's motion for relief from judgment does not constitute an objection as contemplated by the statute. *Id.* at n. 1.

Strict interpretation of the Ohio statute is appropriate. As the Ohio Supreme Court recognized:

> While strict adherence to the procedural mandates of R.C. § 3107.07(B) might appear unfair in a given case, the state's interest in facilitating the adoption of children and having the adoption proceeding completed expeditiously justifies such a rigid application.

Id. at 652.

Petitioner asserts that if a specific document or objection is necessary, then the State must give him adequate notice of that fact. Pet. Brief at 20. The statute itself puts Petitioner on notice of the requirement of an objection. In *Lehr v. Robertson*, 463 U.S. 248 (1983), a putative father failed to mail a postcard to the putative father registry which would have guaranteed that he would receive notice of adoption proceedings. This Court found, "[t]he possibility that he may have failed to do so because of his ignorance of the law cannot be a sufficient reason for criticizing the law itself." *Id.* at 264.

II.

THE OHIO SUPREME COURT PROPERLY HELD THAT PETITIONER HAD SUFFICIENT NOTICE OF THE ADOPTION.

Petitioner was on actual notice of the adoption proceedings. He personally appeared to offer his conditional consent. He received notice of the final hearing scheduled for October 4, 1993 which was continued at the birth mother's request. At this point in time, the putative father and birth mother were reflecting a united front against Respondent. Petitioner filed, through counsel, a motion for relief from judgment which was denied by the trial court on March 2, 1994. He participated throughout the appellate process.

The Ohio Supreme Court correctly held:

> The procedures currently in place under Ohio law adequately protect a biological father's constitutionally protected right. If a biological father undertakes any of the actions set forth in R.C. 3107.06(F)(1) through (3), he may file an objection to the adoption, thereby making his consent necessary under R.C. 3107.06. If such an objection is made, the court may enter a decree of adoption *only* upon finding, after proper notice and hearing, that (1) the putative father is not the father of the minor, or (2) that he has willfully abandoned or failed to care for and support the minor, or (3) that he abandoned the mother of the minor during pregnancy and up to the time of her surrender of the child or its placement in the home of the petitioner, whichever occurs first. R.C. 3107.07(B). If the objection is not made after proper notice, the putative father's consent becomes unnecessary. *Id.*

Id. at 653-54.

Petitioner's claims are analogous to those set forth in *Lehr v. Robertson*, *supra*. In *Lehr*, a putative father failed to mail a postcard to the putative father registry and therefore forfeited his right to have notice of adoption proceedings for his alleged child. *Id.* As Petitioner correctly notes, this Court found that if an unwed father demonstrates a "full commitment" to the responsibilities of parenthood then his interest in contact with the child requires protection under the Due Process Clause. *Id.* at 261. However, Petitioner neglects to mention that this Court

also found in *Lehr* that, in failing to mail his postcard to the putative father registry, the putative father failed to demonstrate a "full commitment" to the responsibilities of parenthood. The Court concluded, "[i]f he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie." *Id.* at 262. The Court found that notice of the adoption was not necessary. *Id.* at 265.

Similarly, Petitioner did not demonstrate a full commitment to the adopted child. Petitioner saw the child only occasionally and in fact demonstrated a commitment only to visit the child, not to parenthood. In *Lehr*, this Court found that a putative father did not demonstrate a full commitment when he, "had never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child." *Id.* at 267 (quoting *Quilloin v. Walcott*, 434 U.S. 246, 256 (1978)).

The child was never in Petitioner's daily custodial care and he failed to provide the indicia of full commitment to the responsibilities of parenthood by objecting to the adoption. The Ohio Supreme Court found, "in the absence of the objection required under R.C. section 3107.07(B), a court lacks any indication of the putative father's full commitment to the responsibilities of parenthood." *In Re Adoption of Zschach*, 75 Ohio St. 3d at 651.

Notice to Petitioner was not necessary. Even assuming it was necessary, Petitioner was on actual notice and he failed to object.

III.

EQUAL PROTECTION CONCERNS ARE NOT RAISED WHEN A PUTATIVE FATHER IS TREATED DIFFERENTLY THAN A BIRTH MOTHER.

The key flaw in Petitioner's final argument is again his failure to recognize his own status as a putative father. The law of Ohio does not treat similarly situated persons differently. Rather, the custodial birth mother is entitled to certain rights and a putative father, because of the uncertain nature of his relationship, is entitled to other rights. If Petitioner had merely objected to the adoption, his failure to consent would be of legal consequence. Because he did not, consent is no longer an issue.

Moreover, the cases cited by Petitioner do not support his claim. In *Quilloin v. Walcott*, 434 U.S. at 256 (1978), this Court found that a Georgia statute that always required a mother's consent to the adoption of a child born out of wedlock, but only required the father's consent if he had legitimated the child, did not violate the Equal Protection Clause because the father had not shouldered significant responsibility for the daily supervision, education, protection or care of the child. This Court reached the same conclusion in *Lehr v. Robertson, supra.*

Moreover, *Caban v. Mohammed*, 441 U.S. 380 (1979) is clearly distinguishable. *Caban* turned on the fact that the mother and father were, in fact, similarly situated. The father had admitted paternity and participated in the rearing of the children. However, even in *Caban*, this Court made it clear that if the father had not "come forward to participate in the rearing of this child, nothing in the Equal Protection Clause [would] preclude[ ] the State from withholding from him the privilege of vetoing the adoption of that child." *Id.* at 392; *Lehr* 463 U.S. at 267. This Court concluded in *Lehr*, "[i]f one parent has an

established custodial relationship with the child and the other parent has either abandoned or never established a relationship, the Equal Protection Clause does not prevent a State from according the two parents different legal rights." 463 U.S. at 267-68. None of the cases cited by Petitioner prevent Ohio from treating an alleged parent who had not accepted the full responsibilities of parenthood differently from a birth parent who had custody of the child.

CONCLUSION

Ohio law requires a putative father to object to an adoption in order to preserve his right to withhold consent. Petitioner failed to do so. He cannot now attempt to disrupt a successful adoption in light of his own failure to act. Strict adherence to these principles is important to maintain the state's interest in facilitating the adoption of children and in order to insure that adoptions are completed expeditiously.

Any unequal treatment Petitioner received is due directly to the fact that he is merely a putative father who failed to object and demonstrate a commitment to the child. Ohio is justified in treating custodial birth parents differently than putative or alleged parents who have never shouldered the full responsibility of parenthood.

The simple fact remains that this is a matter in which the Ohio Supreme Court properly applied Ohio law. This Petition does not warrant review by the United States Supreme Court.

For the foregoing reasons, Petitioner's petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A — JUDGMENT OF THE PROBATE COURT OF FAIRFIELD COUNTY, OHIO FILED AUGUST 30, 1993

PROBATE COURT OF FAIRFIELD COUNTY, OHIO

CASE NO. 53261

IN THE MATTER OF THE ADOPTION OF

GLENNOEL GRETCHEN REAH ZSCHACH

JUDGMENT ENTRY

This matter came on for review by the court on a motion for summary judgment filed by the petitioner, Marylou Zschach and a motion for summary judgment filed by Nan Barnebey and the memorandum of Stephen Johnson. The court also had before it a motion to strike the affidavit of Viola Fisher filed on July 26, 1993 and a motion to dismiss the motion for summary judgment filed by Nan Barnebey on July 15, 1993.

The court has reviewed both motions for summary judgment, as well as the motion to strike, the motion to dismiss the summary judgment motion of Nan Barnebey and all supporting documents and the court rules as follows: The motion to strike the affidavit of Viola Fisher is denied as is the motion to dismiss the summary judgment motion of Nan Barnebey. The court has considered both motions for summary judgment on the merits and the court finds no evidence to support the allegations made by Nan Barnebey of fraud, misrepresentation and undue influence.

Since no evidence has been produced to support the allegations of Nan Barnebey and since evidence has been

produced to show the consent of Nan Barnebey on November 24, 1992 before a Judge was made voluntarily, with full knowledge of the circumstances, with the aid of legal counsel and with her specific response that she did not want visitation, the court does grant the motion for summary judgment filed by Marylou Zschach. The motion for summary judgment by Nan Barnebey is denied.

s/ S. Farrell Jackson
JUDGE

Copies: Atty. James C. Aranda
Atty. Ellen L. Wristen

Supreme Court, U.S.
FILED
NOV 14 1996
OFFICE OF THE CLERK

No. 96-526

(3)

In The

Supreme Court of the United States

October Term, 1996

STEPHEN JOHNSON,

Petitioner,

v.

MARYLOU ZSCHACH,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Ohio

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

In her Brief in Opposition, the Respondent has (1) made erroneous contentions with regard to Mr. Johnson's Petition for Certiorari, (2) misstated this Court's jurisprudence on due process requirements for putative fathers in adoption proceedings, and (3) failed altogether to address central issues of this appeal. Mr. Johnson thus files this brief reply.

1. "Bait and Switch" Notice Does Not Satisfy the Due Process Clause

The Respondent fails completely to address the "bait and switch" consent process in the present case, the issue that is arguably the most serious in terms of its potential effect upon others. Where the Due Process Clause requires notice and an opportunity to be heard, courts simply cannot obtain the consent of a party to one agreement, radically change the terms of the agreement, and then hold that party bound to the new terms to which he did not even have notice and an opportunity to object. If they could, the concept of "consent" in all kinds of contexts would become meaningless. **Any** kind of decree, settlement, or order could be agreed to by a party, subsequently altered materially by the court, and then declared binding, without further notice or hearing, upon the helpless party. Not only would such a situation create an unbearable burden upon the courts (as attorneys would prudently advise clients never to consent to anything to avoid this risk), it obviously would not satisfy the requirements of the Due Process Clause.

Yet, that is exactly what occurred in the present case. The only notice and opportunity to be heard provided to Mr. Johnson occurred **before** the probate court changed the central element of the adoption order, without which Mr. Johnson's consent was, by its own terms, null and void. It is ludicrous to suggest that his not having objected to an adoption to which he **did** consent negated his due process right to object to an adoption to which he **did not** consent. The Respondent does not even address, let alone attempt to resolve, this problem.

2. Mr. Johnson Was Not Even Required to File an Objection

The Respondent is simply incorrect in her assertion that the consent of **any** putative father is required only if he has filed an objection. That is true only of putative fathers who have not signed the birth certificate or otherwise validated their paternity pursuant to R.C. 3107.06(F). Mr. Johnson, having signed the birth certificate, therefore was not even required to object to preserve his right to withhold consent (although he did in fact object). In *In re Adoption of Bowes,* 105 Ohio App. 3d 574, 664 N.E.2d 963 (1995), the court clarified that R.C. 3107.06(F) is properly read in the disjunctive:

> Although [a putative father] has the right to withhold consent under R.C. 3107.07(B), he may be precluded from doing so **if** he has not met **at least one** of the three requirements of R.C. 3107.06: (1) he must have signed the birth certificate and now [*sic*] a written consent to the adoption; **or** (2) he must have validated his paternity pursuant to R.C. 3107.06(F)(1), (2), or

> (3); **or** he must have timely filed an objection to the adoption under R.C. 3107.06(F)(4).
>
> Here [the putative father] **had neither validated his paternity nor signed the birth certificate. Therefore,** unless he filed timely objections, he had no right to contest the adoption.

Id. at 577, 664 N.E.2d at 965-66 (emphasis added). *See also In re Adoption of Greer,* 70 Ohio St. 3d 293, 301, 638 N.E.2d 999, 1005 (1994) ("Upon taking the actions described in R.C. 3107.06(F)(1), (2), and (3), putative fathers are vested with a significant right, *i.e.,* the right to withhold consent to the adoption. . . . Once vested with that . . . interest, such fathers may not be deprived of that interest in the absence of procedural due process requirements of adequate notice and an opportunity to be heard.").

The disjunctive reading of the R.C. 3107.06(F) is also compelled by the due process necessity of construing any exception to the consent requirements strictly in favor of the biological parents, *In re Adoption of Schoeppner,* 46 Ohio St. 2d 21, 24, 345 N.E.2d 608, 610 (1976), and by the rule of statutory construction requiring statutes to be construed so as to give effect to every portion of the statute. The objection requirement thus applies only to putative fathers who fall within R.C. 3107.06(F)(4), not those who, like Mr. Johnson, fall within R.C. 3107.06(F)(1) through (3). If this were not the case, subsections (1), (2), and (3) would be completely superfluous. *Greer,* 70 Ohio St. 3d at 300, 638 N.E.2d at 1005 ("The statute cannot, however, logically be read to require a putative father to comply with each and every subsection of division (F). . . . That being the case, it is unlikely that the

legislature intended that putative fathers falling within the scope of R.C. 3107.06(F)(1), (2), or (3) should also be required to comply with R.C. 3107.06(F)(4). . . . ").

3. Mr. Johnson's Right to Equal Protection of the Laws Was Violated

The Respondent argues that this case is distinguishable from this Court's decision in *Caban v. Mohammed*, 441 U.S. 380 (1979), because, she claims, Mr. Johnson failed to "demonstrate full commitment to the responsibilities of parenthood." First of all, this is not even true: contrary to the Respondent's assertion, the record does indeed contain ample evidence of Mr. Johnson's relationship with Cybele and his contributions, both personal and financial, to her support and upbringing. *See, e.g.*, Affidavit of Sharon Kraft, Supplement to Brief of Appellant Stephen R. Johnson in the Ohio Supreme Court. Second, the question of Mr. Johnson's Participation in Cybele's upbringing has never been litigated in this case: no one in this case, including the Respondent, ever even relied below on any allegation that Mr. Johnson had failed to communicate with, neglected, or otherwise abandoned Cybele. Nor has there ever been any judicial finding that Mr. Johnson failed in his duties to his daughter. No such hearing was ever held, and the court never issued any such finding.[1] The issue whether Mr. Johnson would not have met the

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[1] Indeed, the court could **not** have done so without a hearing. R.C. 3107.06(F)(4) (consent excused even for putative fathers falling within R.C. 3107.06(F)(4) only if "the court finds, **after proper service of notice and hearing**," that he has abandoned the child (emphasis added)).

appropriate standards has never been raised in this case, and any such determination without notice and an evidentiary hearing would be an obvious violation of due process. If the Respondent would rely on Mr. Johnson's alleged failure to perform his parental duties under Ohio law, she must first attempt to satisfy her burden of proof on that issue in a proceeding as required by both Ohio law and the Due Process Clause.

Finally, Mr. Johnson's involvement with his daughter goes well beyond the threshold set by this Court for excusing a consent requirement. The Respondent, in her use of the language "demonstrating full commitment to the responsibilities of parenthood," overstates the standard set forth by this Court in *Caban*, 441 U.S. at 392 (putative father must "come forward to participate in the rearing of" the child), and *Lehr v. Robertson*, 463 U.S. 248, 267 (1983) (putative father held to standard of "shoulder[ing] significant responsibility for the daily supervision, education, protection, or care of the child") (quoting *Quilloin v. Walcott*, 434 U.S. 246, 256 (1978)). The standard set forth in the pertinent statues is even farther from the one the Respondent proposes: the consent even of a putative father who falls under R.C. 3107.06(F)(4) cannot be excused for failure to "demonstrate full commitment to the responsibilities of parenthood," but only if (after proper notice and hearing) he has been found by the court to have "willfully abandoned or failed to care for and support the minor." R.C. 3107.06(F)(4). Mr. Johnson has never abandoned or failed to care for his daughter, nor is there ever any such allegation anywhere in the record. To the contrary, he participated actively in her

care and support. Mr. Johnson has satisfied the standards set forth in *Caban, Lehr,* and *Quilloin*. Therefore, he was entitled to the notice and hearing which was denied.

4. Mr. Johnson Has Relied Only on Matters Wholly Within the Record

The Respondent erroneously claims that Mr. Johnson has relied on matters outside the record.[2] The Respondent evidently has misconstrued the scope of the term, "record". The record of a case includes, *inter alia,* all pleadings, affidavits, documents and exhibits filed in the court or courts below. *See* U.S. Sup. Ct. R. 12.7; Ohio Sup. Ct. R. 5, § 1 (App. 2). Everything relied upon in Mr. Johnson's petition for certiorari is supported by documents properly contained in the record.

The Respondent may be confusing matters of record with matters adjudicated by the courts below. Ironically, the very fact there was no adjudication of the matters referred to by the Respondent is a consequence of the

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[2] In fact, it is the Respondent who has made numerous excursions outside the record. Many are inconsequential (*e.g.*, the fanciful and irrelevant allegation, made for the first time in the Brief in Opposition, that Mr. Johnson visited Cybele primarily to see Ms. Zschach, and the allegation that Cybele "is currently in a loving, nurturing home environment"). More serious is the Respondent's incorrect and unsupported contention that Mr. Johnson failed to demonstrate a commitment to his daughter.

probate court's improper failure to hold a hearing on the final adoption decree.

Respectfully submitted,

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APPENDIX

United States Supreme Court Rule 12: Review on Certiorari: How Sought; Parties

Section 7. The clerk of the court having possession of the record shall keep it until notified by the Clerk of this Court to certify and transmit it. In any document filed with this Court, a party may cite or quote from the record, even if it has not been transmitted to this Court. When requested by the Clerk of this Court to certify and transmit the record, or any part of it, the clerk of the court having possession of the record shall number the documents to be certified and shall transmit therewith a numbered list specifically identifying each document transmitted. If the record, or stipulated portions, have been printed for the use of the court below, that printed record, plus the proceedings in the court below, may be certified as the record unless one of the parties or the Clerk of this Court requests otherwise. The record may consist of certified copies, but if the lower court is of the view that original documents of any kind should be seen by this Court, that court may provide by order for the transport, safekeeping, and return of such originals.

Ohio Supreme Court Rule 5: Transmittal Of Record On Appeal

Section 1. Composition of the record on appeal

In all appeals, the record on appeal shall consist of the original papers and exhibits to those papers; the transcript of proceedings and exhibits, along with a computer diskette of the transcript, if available; and certified copies of the journal entries and the docket prepared by the clerk of the court or other custodian of the original papers.